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SOME PRIVATE INTERNATIONAL LAW PROBLEMS ARISING OUT OF EUROPEAN RACIAL LEGISLATION, 1933–1945

(1) INTRODUCTORY

In 1933 the Nazis came to power in Germany and commenced their violent persecution of the Jews. In the course of this persecution they made the fullest use of the whole apparatus of the law, and in time their example was followed by other European States which voluntarily or by compulsion found themselves part of the Axis, and which signified their attachment to it by turning on the Jewish communities in their midst. The purpose of this article is to examine some of the problems to which the existence of legislation of this nature has given rise. It is not necessary to give a detailed description of this legislation, but the following general picture will suffice. According to the German system, race was the decisive factor in determining who is a Jew. Nationality was of no importance. The law set up numerous legal restrictions on the personal and political rights of the ' non-Aryan ' population, such as the prohibition of marriage between Jews and citizens of German or similar blood. Other laws were passed imposing extraordinary restrictions on Jews and other ' non-Aryans ' with regard to their property, their freedom to dispose of their possessions, and their occupational freedom.[1] The prototype of this legislation is found in the so-called Nuremberg Laws of September 15, 1935. The Law Respecting Reich Citizenship [2]

[1] S. Goldschmidt, *Legal Claims against Germany*, New York, 1945, p. 149. There is a voluminous literature on German anti-semitism. Good summaries of the legislation will be found in Hope Simpson, *The Refugee Problem, Report of a Survey*, London, 1939, and Supplement, London, 1939. James G. McDonald's letter of resignation as High Commissioner for German Refugees, dated December 27, 1935, contains a thorough description of the legislation then existing. James Parkes, *The Emergence of the Jewish Problem*, London, 1946, also contains some useful information. Texts of all important laws issued during the period 1938–1945 can be found in the *Contemporary Jewish Record*, New York, 1938–1945; and indications of the state of affairs in different countries can be seen in the volumes of the *American Jewish Year Book*, Philadelphia, from 1933 onwards.

[2] Parkes, *op. cit.*, p. 223. *Reichgesetzblatt* i (1935), p. 1146; see Garner, ' Recent German Nationality Legislation ' in *American Journal of International Law*, Vol. 30 (1936), p. 96.

and the Reich Flag Law [3] placed the Jews in the position of second-class citizens, while the insulting Law for the Protection of German Blood and Honour [4] had the object of preventing sexual intercourse between Jews and non-Jews. This law contained the following clauses which are important for our purpose:—

1 (i) Marriages between Jews [5] and nationals of German or kindred blood are forbidden. Marriages concluded in defiance of this law are void, even if, for the purpose of evading this law, they are concluded abroad.

(ii) Proceedings for annulment may be initiated only by the Public Prosecutor.

5 (i) Whoever acts contrary to the provision of 1 will be punished with penal servitude.

Other countries adopted similar provisions, which, although varying from the German in points of detail, do not give rise to particular problems.[6] We shall therefore concentrate in this study on the German laws.

(2) BASIC PRINCIPLES

The fundamental rules for deciding what is foreign law, after, by application of the principles of English private international law, it is ascertained that a foreign system of law is applicable, are as follows:—

(i) Where the court has recourse to the law of a foreign country it may only apply the law which is in force

[3] *Reichgesetzblatt* i (1935), p. 1145.

[4] Parkes, *op. cit.*, p. 224. *Reichgesetzblatt* i (1935) 1146–7. For discussion, see Dietz, 'La Nouvelle Législation allemande sur le marriage', in Clunet, *Journal du droit international*, Vol. 66 (1939), p. 52.

[5] The term 'Jew' was defined in two sections and five sub-sections in the First Decree to the Reich Citizenship Law, November 17, 1935, in *Reichgesetzblatt* i (1935), pp. 1333–4.

[6] The texts of many of these laws will be found in B. D. Weinryb, *Jewish Emancipation under Attack*, New York, 1942. But much of the war-time legislation introduced under German occupation is not easily available. For specific countries the following works can be consulted: Italy, E. Momigliano, *Storia Tragica e Grottesca del Razzismo Fascista*, Verona, 1946; France, H. Snider, 'Lights and Shades of Jewish Life in France, 1940–42' in *Jewish Social Studies*, New York, October, 1943; Czechoslovakia, M. Moskowitz, *The Jewish Situation in the Protectorate of Bohemia-Moravia*, *ibid.*, January, 1942; Hungary, L. Rittenberg, 'The Crisis in Hungary', *Contemporary Jewish Record*, New York, May, 1939. A useful summary of the position as it existed after the termination of hostilities, will be found in Appendix II of the Report of the Anglo-American Committee of Enquiry regarding the Problem of European Jewry and Palestine, Parliamentary Papers, Misc. No. 8 (1946), Cmd. 6808, and much general information in Lemkin, *Axis Rule in Occupied Europe*, Washington, 1944.

there at the time. It must not apply foreign law which has been repealed.[7]

(ii) The court must apply the law of a foreign country just as the courts of that country would apply it.[8]

(iii) On the other hand, and contradictorily, a foreign penal law will not be applied.[9]

Whether a foreign law is or is not penal is a question of classification according to the forum, and the English courts give the term ' penal ' a very wide interpretation in this connection. An example in point is *Lecouturier* v. *Rey*,[1] where provisions of a French law of 1901 restricting religious congregations and liquidating the property of non-authorised congregations were regarded as penal. There is a long line of cases arising out of the Russian [2] and Spanish [3] revolutions to the effect that foreign laws of a confiscatory or penal nature will be of no effect outside the territory of that State. There is also authority that any personal status unknown to English law will be disregarded as being penal; and this includes disabilities caused by religious belief or race.[4] It has therefore been suggested [5] that where foreign law is applied, legislation discriminating against the *de cujus* will in general be excluded from application.[6]

(3) GENERAL CASES

It is surprising that the question of the enforceability of European racial legislation has apparently not been directly tested by British courts since 1933. That this legislation is

[7] Martin Wolff, *Private International Law*, London, 1946, p. 213.

[8] Wolff, *ibid.*, p. 215: Dicey, *Conflict of Laws*, 5th ed., 1932, p. 61: Rabel, *The Conflict of Laws*, Vol. 1, Chicago, 1945, p. 67.

[9] Wolff, *ibid.*, p. 172: Cheshire, *Private International Law*, 3rd ed., 1947, pp. 175 *et seq.* Dicey, *ibid.*, p. 212: Schmitthoff, *English Conflict of Laws*, London, 1945, pp. 54, 63.

[1] [1910] A.C. 262.

[2] *A. M. Luther* v. *Sagor & Co.*, [1921] 1 K.B. 456, [1922] 3 K.B. 532. See N. Bentwich, ' The Soviet Government and Russian Property in Foreign Countries ' in *British Year Book of International Law*, Vol. 5 (1924), p. 78. For the American view, see *U.S.* v. *Belmont* (1937), 301 U.S. 344.

[3] *Banco de Biscaya* v. *Don Alfonso de Bourbon y Austria*, [1935] 1 K.B. 140.

[4] Wolff, *op. cit.*, p. 173. Dicey, *op. cit.*, p. 534. Cheshire, *op. cit.*, pp. 192–196. For the post-war Italian view see Pallieri, *Diritto Internazionale Privato*, Milan, 1946, p. 103. But on the Continent public policy is not static. Thus Niboyet, *Traité de droit international privé*, Paris, 1944, Vol. 3, p. 557, speaking of the ' incapacité de caractère racial que certains Etats croient devoir edicter ' says: il est bien certain que notre droit public, d'après lequel tous les êtres humains sont égaux, quelles que soient leur race ou leur couleur, s'était opposé jusqu'ici à la réception de toute solution de ce genre . . . Bien entendu, il faut se souvenir que l'ordre public n'est pas stable, et qu'il changerait si les conceptions françaises sur le probleme juif venaient à se modifier dans l'avenir.

[5] Rowson, ' Domicile of Political Refugees ' in *Law Times*, Vol. 192 (1941), p. 39.

[6] Thus Wolff, *op. cit.* p. 174, says that the English court will (probably) refuse to apply the Nuremberg Laws.

generally speaking penal, and will therefore not be enforced here, can be accepted as axiomatic, although even this point has not been specifically decided in England. In the course of this article, therefore, it will be necessary to examine some American, Dutch and Scottish decisions, not primarily for purposes of comparison, but rather so as to fill in some of the *lacunæ* which would otherwise exist. Nevertheless the *lacunæ* are many, and the unsolved problems outnumber the solved.

In most countries, it seems, the courts have tried to avoid all reference to German law so far as possible, and have made use of discretionary powers governing procedure to this end. Where reference is made to German law, as, for example, the proper law of the contract, it is clear that penal provisions will be ignored. *Oppenheimer* v. *Rosenthal & Co.*[7] provides a good example of this. The plaintiff, a German Jew, brought an action in the English court against the defendant, a German company for which the plaintiff was London manager. The action was for wrongful dismissal, and it can be stated that the proper law of the contract was German. The letter of dismissal was signed in Germany but posted in England. One of the plaintiff's contentions was that England was the *forum conveniens* because, being a Jew, he would not obtain a fair trial in Germany, since, if he went there personally, his liberty would be in danger and he might not be allowed an advocate to plead his cause. This contention was accepted by the Court of Appeal, overruling the judge in chambers, and leave was granted to serve the writ in Germany.

A stronger case is *Ellinger* v. *Guinness, Mahon & Co., Frankfurter Bank A.G. and Metall Gesellschaft A.G.*[8] The facts were complicated. They concern an issue of gold mortgage bonds made in Germany by a German bank to Guinness, Mahon & Co., an English firm, which covenanted with the registered holders to receive and distribute all principal sums and interest due thereon. The plaintiff, a German Jew, purchased such bonds to the value of 20,000 gold marks through the second defendants, and entered on the register the name of the third defendants who credited the interest they received to the plaintiff. Neither the second nor the third defendants had any beneficial interest in the bonds. In 1933 the plaintiff was dismissed from his post in Germany by reason of his Jewish birth, and in 1936 he left that country and came to England,

[7] [1937] 1 All E.R. 23.
[8] [1939] 4 All E.R. 16, Chancery Court.

where he became naturalised in 1939. After he left Germany the plaintiff obtained release of part of his foreign securities in consideration of his relinquishing his rights to the remainder, in which these bonds were included. By the present writ he claimed against the first defendant a declaration that he was entitled to be registered as holder of these bonds and an injunction and other relief, and consequential orders against the second and third defendants. The learned judge gave leave to serve notice of the writ against these two defendants out of the jurisdiction, and the present motion was brought by them to discharge that order.

There was no dispute that as between the plaintiff and the second two defendants, the matter was not only governed by German law but by agreement between them subject to the exclusive jurisdiction of the German courts. Morton, J., however, rejected any argument, by the defendants, based on this, for the discharge of his previous order on a number of grounds. One of these, with which we are concerned here, was the evidence before him as to the probable fate of the plaintiff if he pursued his claim in Germany. 'At the moment this evidence is not contradicted. In these circumstances it would be wrong in my judgment to refuse the plaintiff the opportunity of having this case determined by the courts in England. If it is to be so determined, the German defendants must be given an opportunity of defending it.'

This is a strong case, because the judge was well aware that 'the plaintiff in his action seeks to compel two foreign corporations to do something which would render them subject to serious penal consequences in their own country'. Holding that the action was properly brought against the English defendants, and that the German defendants were necessary parties to the action, he left it to the trial judge to determine what relief (if any) was to be granted against these defendants. 'I am only deciding that they are parties who ought properly to be served with notice of the writ.'

A further indication of a benevolent attitude is provided by *Weiner* v. *Central British Fund for German Jewry*,[9] a war-time case. The plaintiff, resident in England, had deposited a sum of money with the defendants for the purpose of assisting some Jewish refugees to proceed from Vienna to

[9] [1941] 2 All E.R. 29. Cf. the Scottish case of *Weiss* v. *Weiss* (1940), Sc. L. T., p. 447, where the Court of Session allowed a pursuer who was an enemy alien (German citizen) domiciled and resident in Scotland to bring an action for divorce.

England, a purpose which the outbreak of war rendered impossible. The action was for the return of the deposit, which the plaintiff admitted would have to be handed over to the Custodian of Enemy Property. The defendants contended that as the proceedings were being brought on behalf of an alien enemy they could not be entertained in England. The court rejected this contention and was prepared to determine the plaintiff's rights provided that any sum recovered was paid to the Custodian.

These three cases turn on technical points of English law. They all have one thing in common, however; they recognise the peculiar status of German Jews. They show that, without entering upon a discussion of substantive law the court will be prepared to avail itself of its discretionary powers to make procedural concessions in appropriate cases, and so avoid undesirable consequences inherent in the application of German law or in allowing the matter to go for trial before German courts.

Another instance of the court ignoring any specific racial provisions that might have been applicable can be seen in *The Matter of D's Infants.*[1] It might have been thought that jurisdiction to appoint a guardian over an infant, being a matter affecting the personal status of that infant, would depend upon the law of the infant's domicile, that is to say his father's domicile if legitimate and his mother's if illegitimate. But in fact the English courts will exercise such jurisdiction either if the infant is of British nationality, or if he is physically resident within the jurisdiction. In accordance with this the court in the present case appointed guardians for German-Jewish children who had been brought to England to escape Nazi persecution and whose parents were still in Germany or Italy, and therefore technically,[2] if not actually, enemy aliens. Two further matters should be observed in

[1] 59 T.L.R. 354. Cheshire, *op. cit.*, 2nd ed., p. 141, cites the *Juristische Wochenschrift* of 1934, p. 1576 to the effect that a parent may be deprived of the custody of his children if he holds political opinions hostile to the National Socialist Government. This is given as an example of a foreign rule which offends the distinctive policy of England. But an application in England for deprivation of guardianship upon these grounds would fail for a different reason, in Dr. Cheshire's view; because English law would be the *lex causae*, *ib.*, p. 152. No doubt the same view would be taken of an Italian law which provides that a parent of the Jewish race may be deprived of paternal authority over children who belong to a religion other than the Jewish, if he should impart to them an education not in harmony with their religious principles or national law.

[2] By virtue of the statutory definition contained in the Trading with the Enemy Act, 1939.

connection with infants. First, by the Guardianship (Refugee Children) Act, 1944, power was given to the Home Secretary to appoint guardians for refugee children, as defined in the Act, without the consent of their parents, thereby removing the necessity for application to the court. Secondly, English law [3] does not permit the adoption in England of any child who is an alien, which term presumably for this purpose includes stateless children. This rule had led to much domestic confusion in England during the period 1933–1939 following upon the arrival in the country of many thousands of German-Jewish children and their acceptance into English homes. To a certain limited extent this confusion, which was not, of course, shared by lawyers, was lessened by the 1944 Act.

The American courts have taken a similar attitude on the whole. In *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*,[4] the plaintiff, a German Jew, had a contract with the defendants, for a period of three years from January 1, 1932, for services to be performed by the plaintiff in Germany or elsewhere outside the jurisdiction of the court. The contract provided for certain money to be paid by the defendants to the plaintiff in the event that he should die or become unable, without fault on his part, to continue his obligations under the contract. The plaintiff's first cause of action alleged that on June 21, 1933, the defendants discharged him upon the sole ground that he was a Jew, as a result of which he suffered damage. The second cause of action alleged that in April, 1933, the German government incarcerated the plaintiff in a concentration camp not by any act or fault on his part, but solely by reason of the fact that it was the policy of the government which required the elimination of all persons of Jewish blood from leading commercial, industrial and other enterprises. The defence was that the contract was made and was to be performed in Germany, was terminated in Germany and was governed by the laws of Germany; and that after April 7, 1933, the German government adopted certain laws requiring persons of non-Aryan descent, of which the plaintiff was one, to be removed. The

[3] The Adoption of Children Act, 1926, s. 2. The consent of the parent or guardian is required before an adoption order can be made.

[4] (1938), 277 N.Y. 474. For the general view that the American courts will disregard *foreign* laws which affect a person's status or are of a penal character, a term which includes racial impediments, see Rabel, *op. cit.*, p. 106. But such general propositions of American law must be treated with some reserve in view of the existence of legislation regarding negroes which might be regarded as discriminating, and therefore unenforceable, in English law. Cf. the *American Restatement of the Law of Conflict of Laws*, paras. 132 (c), 132 (d), and illustration 3 on pp. 197, ff.

New York Court of Appeals did not think that the first cause of action stated facts sufficient to constitute a cause of action. The defendants did not break their contract with the plaintiff. They were forced by operation of law to discharge him. They, however, allowed the second cause of action, and referred the issue to trial as to the meaning of the contract according to German law.[5] In other words, they achieved the same result as that reached by the English court in *Oppenheimer's Case*.

An important will case is *Re Weidberg's Estate*[6] where the court declined to pay to the German Consul-General distributive shares of German nationals of the Jewish race who, having made good their escape from Germany, were residing in Palestine, Belgium and Denmark. Referring to the fact that a mass fine of 400,000,000 dollars[7] had been imposed by the German government on all its nationals of the Jewish race, the court concluded: it cannot be asserted that there is not a distinct possibility, whether or not the distributees are now alive, that if money belonging to them came into the hands of a German official, it might not be seized for this purpose, especially if, as is asserted in the present situation, they have escaped from the territorial jurisdiction of the Gestapo and its concentration camps.

(4) DENATIONALISATION BY DECREE OF GERMAN GOVERNMENT

The only one of the Nuremberg Laws which, it seems, has been directly considered by the English court is the Reich Citizenship Law.[8] Under this law a decree was issued in November, 1941, which purported to denationalise all German emigrants outside the borders of the Reich, and to confiscate their property and assets within those borders. In *R.* v.

[5] In *Anninger et al* v. *Hohenberg et al* (1939), 18 N.Y.S. (2d) 499, concerning a claim by an Austrian administrator holding his position by virtue of German expropriatory decrees, after the Anschluss, the court said: 'To grant this motion would be an acknowledgment that the claim of the Austrian legislator has a status here. Put differently it would mean that our courts will not only recognise but tender assistance to the confiscatory, proscriptive policies of the German Reich. To this doctrine I am unwilling to subscribe. To be sure, we may be powerless to extend the jurisdiction of this court to Austria, but when it is essayed to invoke our legal weapons to execute policies which are rejected here, we can and do refuse to lend our aid'. *Annual Digest of International Law Cases*, 1938–40, p. 20.

[6] (1939), 15 N.Y.S. (2d) 252. *Annual Digest*, 1938–40, p. 71.

[7] One milliard Reichsmarks. Decree regarding the Atonement Fine of Jewish State Subjects of November 12, 1938, *Reichgesetzblatt* i (1938), p. 1579, English translation in *Contemporary Jewish Record*, New York, January, 1939, p. 55; decree issued under the Decree of October 18, 1936, for the Execution of the Reich Four Year Plan, *Reichgesetzblatt* i (1936), p. 887.

[8] *Reichgesetzblatt* i (1935), p. 146.

Home Secretary, Ex p. L,[9] the applicant for an order of habeas corpus had, on the outbreak of the war, been an enemy alien. He was in fact an Austrian citizen who became German by virtue of a German decree of 1938, the effect of which was recognised by His Majesty's Government (though the Report does not state whether the court based its findings in this respect upon a certificate from the Secretary of State or on evidence obtained *aliunde*). During the war he was interned. It is settled law that no order of habeas corpus will issue at the instance of an enemy alien, because he is not under the King's peace. However, the question that arose in this case was whether the applicant had lost that status by virtue of the German decree purporting to denationalise him, and by virtue of which he was stateless in the eyes of German law. The Divisional Court held that such changes of nationality in wartime could not be recognised, mainly because to do so would be contrary to public policy. This case has been subjected to some criticism. But too much should not be read into it. In the first place the nationality problem raised is one of public, not of private, international law. In the second, the narrow, and intentionally restricted law and procedure governing applications for orders of habeas corpus has the effect that this decision can only be regarded as authoritative in questions relating to habeas corpus. Thirdly, the essential words of the decision are that such changes of nationality are not to be recognised *in time of war*. The case does not decide that such changes will never be recognised for any purposes, even in wartime, and it may be arguable, to say the least, that where reference is made by the rules of English private international law to German law which itself has different rules for its own nationals and for stateless persons, the English court, which is bound to accept the whole of the German law, will have to apply those provisions which relate to stateless persons, and thus indirectly give effect to the Nuremberg Laws, though in a way possibly not unbeneficial to the claimant.[1] Fourthly,

[9] [1945] K.B. 7. For a valuable discussion of this case, see *Law Quarterly Review*, Vol. 61 (1945), p. 126. The German law in question was repealed later by Military Government and by the Control Commission: see *Military Government Gazette*, No. 3, pp. 1 and 50, and No. 5, p. 85. Further valuable comment can be found in Abel, 'Effect of German Denationalisation Decree of November 25, 1941' in *Modern Law Review*, Vol. 8 (1945), p. 77, and 'Denationalisation' by the same author, *ibid.*, Vol. 6 (1943), at p. 57.

[1] Thus, by a German Statute of April 12, 1938, concerning the legal status of stateless persons, *Reichsgesetzblatt* i (1938), p. 380, the law of the deceased's ordinary residence was made applicable to deceased stateless persons. In *Re Cohn*, [1945] Ch. 5, the famous case of *commorientes*, the deaths had occurred before the date of the 1941 decree, and therefore the German rules applicable to

had the court recognised the denationalisation it would have given effect to a foreign penal law in fact (although this was not the basis of the decision). This denationalisation problem has also arisen in the United States, where the opposite conclusion was reached. In *United States ex rel. Schwarzkopf* v. *Uhl*[2] the relator, a naturalised citizen of Austria, arrived in the United States in 1936. After Germany invaded and absorbed Austria in 1938, a German decree granted German citizenship to all Austrians. The United States Enemy Alien Act[3] provided for the arrest and detention of enemy aliens. The relator was so arrested, and sought by writ of habeas corpus to end his detention. The (federal) district court dismissed the writ, but on appeal it was held that since an invader cannot under international law impose his nationality upon non-resident citizens of the subjugated country without their consent, the appellant was not a German citizen. The judgment was therefore reversed and the writ sustained. A similar decision was reached by the Appeal Court in the case of a man who left Austria before the Anschluss but did not reach the United States until 1939.[4] There is an important difference between the American and the English cases, for the U.S. Government had never taken the position that Austria was legally absorbed into the German Reich.

The question has also arisen in Holland, although much earlier. In a case before the Dutch Court of Appeal in The Hague, on April 27, 1936, the defendant to an action asked

German nationals were applied. It would be interesting to speculate what rules of German law the court would have applied had the death occurred after the date of this decree.

[2] (1943), 137 F. (2d) 898. These American cases also illustrate the difference between an application for habeas corpus where there is a written constitution, and where there is an unwritten one.

[3] 40 Stat. 531 (1918), 50 U.S.C. § 21 (1940).

[4] *United States ex rel D'Esquiva* v. *Uhl*, 137 F. (2d) 903. These two notes are taken from *Harvard Law Review*, Vol. 57 (1943), p. 251; full reports of these cases are not available to me at the time of writing, and in particular it is not known whether the German decree of November, 1941, was considered. For further American comment see Borchard, 'Collective naturalisation after conquest, its inapplicability to non-residents', in *American Journal of International Law*, Vol. 37 (1943), p. 634. The French court, in considering the effect of the German decree, has held, in *Soc. L. et Cie* vs. *D. . . et S. . .* (*Gazette du Palais*, February 27, 1945), that persons denationalised by it were nevertheless to be regarded as enemy nationals. In Portugal a ministerial decree of May 28, 1945, also provided that for certain purposes persons who became stateless after September 1, 1939, were to be regarded as retaining the nationality they possessed on that date. There was a different approach in Switzerland, where it appears that actual documentary proof of individual denationalisation is required, so that persons denationalised under the German decree cannot claim automatic exemption from an obligation to register their property imposed upon German nationals.

that the plaintiff, a German Jew, should give security for costs on the ground that the latter had lost his former German nationality by virtue of the Nuremberg laws. The court held that there was no ground whatsoever to be found in the *Reichsburgergesetz* to assume that Jews of German nationality had been deprived of their nationality (*Staatsangehörigkeit*).[5]

(5) MATRIMONIAL LAW

The most difficult problem, however, concerns marriages which are forbidden by this type of legislation: and, even more important, decrees of nullity made pursuant to it. Here there are no English or American decisions which can guide us, and the matter must therefore be considered in the light of the general provisions, which themselves have undergone many changes in recent years.

Wolff quotes the instance of two German refugees—he does not state where they are domiciled—resident in England and desirous of contracting a marriage forbidden by the Nuremberg Laws. He concludes that the registrar would (probably) allow it, even if he knew that one of the parties was a Jew and the other an ' Aryan-German '.[6] Dr. Cheshire, on the other hand,

[5] *Annual Digest of International Law Cases*, 1935–37, p. 201. *Nederlandsche Jurisprudentie and Weekblad van het Recht* (N. J. & W.), 1936, No. 455.

[6] *Op. cit.* p. 174. At the same time he points out that countries which are bound by The Hague Convention on Conflict of Laws in respect to marriages of 1902, may be in difficulties in refusing to apply the Nuremberg Laws. This Convention was intended to reduce the prohibiting effect of domestic marriage impediments to a few fundamental points, and included religious prohibitions among five prohibitions entitling a party to the Convention to prevent the celebration of marriages on grounds, not of the personal law of the parties, but of its own local law. Holland was a party to this Convention. The Dutch courts have several times been faced with questions involving the Nuremberg Laws, which it is convenient to summarise here. In a decision of May 20, 1936, the District Court of Dondred found that the impediment established by the Nuremberg Laws was based upon a race distinction, and, therefore, was not exclusively on motives of a religious nature in the sense of The Hague Convention. It therefore held that the impediment must be regarded as relevant by the Dutch registrar. But the District Court of Rotterdam on May 29, 1936, held that the German laws do not apply to a marriage between a Dutch Jew and a German non-Jewish woman, as German law is not intended to apply to Dutch subjects. Moreover, a legal impediment against a marriage based on a race distinction is not applicable to Dutchmen. The District Court of Bois le Duc went even further. In a decision of June 16, 1936, it held that German law would not prevent a marriage in Holland between a German Jew and an Austrian non-Jewess, and that the lack of a certificate of fitness to marry (*Ehetauglichkeitzeugnis*) required by a German Ordinance made under the Nuremberg Law was not an impediment to a marriage, because neither Dutch law nor Austrian law knew the legal qualification of a Jew in its racial meaning. This was followed in a decision of July 31, 1936, in a case concerning the marriage of a stateless Jew from Poland with a German woman. See *Annual Digest of International Law Cases*, 1936–37, p. 202. These Dutch decisions may be compared with a decision of the Hamburg Court (which is not, however, unchallenged) of October 6, 1908, that a marriage celebrated in

writing in 1938, considered the same problem where the two persons were domiciled in Germany,[7] and his view was that as the essential validity of the marriage would depend upon German law, being the law of the domicile, the marriage should be disallowed in England. He thought that the only escape from this result would be obtained by invoking the doctrine that the English court will not enforce a foreign penal law, and that the Nuremberg laws are penal. He doubted the practical wisdom of this if the parties are in fact domiciled in Germany. But this argument is not conclusive. In the first place, owing to the technicalities of the law regarding the acquisition of a domicile of choice[8] a refugee may be of German domicile (of origin) notwithstanding his firm intention never to return to Germany, merely because his present intentions are too indefinite. In fact, Dr. Cheshire's doubts on this score are only fully justifiable where the German domicile, which may otherwise be merely a technical thing, is coupled with a firm intention to return to Germany so that the validity of the marriage might the more easily be called into question, or criminal proceedings instituted, before German courts. Secondly, it is possibly relevant to point out that although the German legislation declares that marriages contracted against its provisions are ' void ', that legislation is peculiar in that it does not permit the parties themselves to initiate nullity proceedings as is the normal case.[9] On the contrary: the German

Germany between an Austrian Jew and a German Catholic is valid by German law despite the fact that it was void by Austrian law which forbad such mixed marriages: for religious equality is a matter of German public policy and therefore overrides the provisions of The Hague Convention: quoted and criticised by Plaisant, *Les Règles de Conflit de Lois dans les Traités*, Paris, 1946, pp. 338–40. For the modern German (Nazi) view of the enforceability of German racial legislation outside Germany, see Raape, *Deutsches internationales Privatrecht*, Vol. 2, Berlin, 1939, pp. 159 ff. For the Hague Convention, see Cheshire, *op. cit.*, 3rd ed., p. 15; Rabel, *op. cit.*, p. 275, and as to its enforceability consequent upon the war, *ibid.*, p. 32.

[7] *Op. cit.*, 2nd ed., p. 148.

[8] Particularly because of the operation of the rule in *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441. Furthermore, if a person intends to settle in a country containing more than one legal system, *e.g.*, the United Kingdom or the United States, he will not acquire a domicile of choice there until he has decided within which legal system he will make his permanent home: *Wahl* v. *Att.-Gen.* (1932), 147 L.T. 392. As to the acquisition by a refugee of a domicile of choice in this country, see *Cruh* v. *Cruh*, [1945] 2 All E.R. 545, which together with *May* v. *May*, [1943] 2 All E.R. 146, removes doubts once expressed by Cheshire (*op. cit.*, p. 178) and others, following *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856. For the position in Scotland, see *Weiss* v. *Weiss*, [1940] Sc.L.T. 447.

[9] For example, in England even a conviction for bigamy does not operate automatically as a declaration of nullity of the bigamous marriage. If such a declaration is required it must be prayed for in the normal way, and a decree *nisi* will be granted in the first instance.

law explicitly states that such suits may only be instituted by the Public Prosecutor, and there is no doubt of the penal nature of the statute in view of the fact that the statute itself provides for the penalty of penal servitude if it is infringed.[1] The effect of this, it is submitted, is to make the marriage not void but voidable, and voidable of a special nature: because it is only avoided by the action of a third party, the State, and despite the will of the parties. Furthermore, if the parties intend to return to Germany, then there is no reason why the English registrar should prevent their marriage solely because by contracting it they are committing a breach of German criminal law. Their eyes must be presumed to have been open when they contracted the marriage, and for the registrar to prohibit it would mean that he would be applying administratively a foreign penal law, and this is contrary to a basic principle of English private international law.

But the converse to this problem, namely, whether the English court will recognise a dissolution or a nullity decreed by the German courts on the ground that the marriage is forbidden by the Nuremberg Laws, is more difficult.

It seems that a distinction must be drawn between divorce [2] and annulment. A decree of divorce granted by the courts of the husband's domicile, or otherwise recognised by the law of the husband's domicile, will be recognised in England.[3]

[1] The German Supreme Court in a decision of February 23, 1938, held that the Nuremberg Laws have extra-territorial effect and, therefore, that punishment can be inflicted within Germany for infringements committed outside Germany. See *Annual Digest of International Law Cases*, 1938–40, p. 294.

[2] For example, Clunet, *Journal de Droit International*, Vol. 63 (1936), p. 182, reports a German case where ' un époux a commis une erreur sur la race de son conjoint non seulement quand il a ignoré que celui-ci était Juif, mais aussi quand il n'a pas en connaissance des particularité physiques, psychiques et morales qui caractérisent et différencient la race juive '. The Court annulled the marriage, basing its opinion on the fact that racial differences first became known after a law of April 7, 1933, before which neither party would have had any cause of action on this ground. In other words, a marriage, fully valid by the law of the domicile at the time it was contracted became void (or voidable) by operation of a subsequent statute. For the English municipal view of such legislation compare the changes introduced into the law by the Matrimonial Causes Act, 1937, and cases. The Nuremberg Laws themselves only allowed annulment at the suit of the public prosecutor. The equivalent Italian law provided that marriages celebrated in violation of it were void, and both the civil registrar and the clergyman were forbidden to carry out the ceremony. Penalties were also provided for infringement.

[3] Rayden's *Practice and Law in the Divorce Division*, 4th ed., London, 1942, p. 476. Cheshire, ' The International Validity of Divorces ' in *Law Quarterly Review*, Vol. 61 (1945), p. 352. In *Mezger* v. *Mezger*, [1936] 3 All E.R. 130, the plaintiff, a German national domiciled in Germany, married in New York in 1928. In 1932 the parties separated and in 1935 the wife obtained a maintenance order in an English court of summary jurisdiction, jurisdiction being based on residence in England. In 1936 the plaintiff sued for divorce in Germany, and the wife defended the case. The decree was granted, although on grounds

Provided the foreign court was competent, the grounds upon which the decree was made will be irrelevant. So much is clear. There is, however, no such clarity over foreign decrees of annulment.[4] Rayden states [5] that the English court may examine any foreign decree of nullity so as to determine whether the court pronouncing it was competent to entertain the suit, and so as to assure itself that the *procedure* [6] (italics supplied) did not transgress the principles of natural justice. If the court is satisfied on these points the foreign decree will be conclusive, even if pronounced on grounds not recognised by English law. The jurisdiction of the foreign court may be based on either the domicile or the residence of the parties. In the latter event Rayden suggests that the conclusive validity of the decree must be dependent upon whether the court pronouncing it had jurisdiction to summon the defendant before it and to decide such matters as it did decide.

Recent English decisions [7] have made it clear that residence alone is sufficient to confer jurisdiction in nullity; and in consequence the question of the essential validity of the marriage according to the law of the domicile of the husband became more important than the question of the formal validity of the marriage according to the law of the place in which it was celebrated. Conversely a nullity decreed by a court exercising jurisdiction on the basis of residence will be of less effect internationally than one granted by a court whose jurisdiction to try the case was based on the domicile of the parties. It is therefore submitted that a decree of nullity granted in Germany on the ground that the marriage contravened the Nuremberg Laws to persons not domiciled but merely resident in Germany would not be recognised in England unless the courts of the domicile would recognise it, following the

which would not be recognised in England (not based on the racial legislation). Subsequently the plaintiff applied to the English court to discharge the maintenance order. The Divisional Court held *inter alia*, reversing the decision of the justices, that the German decree, being a decree of the court of the domicile, must be recognised in England as dissolving the marriage, and that it was immaterial for this purpose whether or not it was made upon grounds which would lead to a divorce in England. From our point of view this is an important case, although one of divorce and not nullity.

[4] For a discussion of the modern position, see J. M. C. Morris, 'Nullity Jurisdiction and Remarriage during voidable marriage' in *Law Quarterly Review*, Vol. 61 (1945), p. 341.

[5] *Op. cit.*, p. 481.

[6] But cf. *Oppenheimer* v. *Rosenthal & Co.*, [1937] 1 All E.R. 23, discussed above.

[7] In particular *Hutter* v. *Hutter*, [1944] P. 95, although the courts of the domicile have pre-eminence: *Galène* v. *Galène* (1939), 55 T.L.R. 505. Here the English court granted a declaration of nullity of a marriage celebrated in England where the husband was domiciled in France after the French court had decreed the nullity on grounds recognised by French law but not by English law.

decision in *Galène* v. *Galène*.[8] As to decrees granted by German courts to persons domiciled in Germany, it is submitted, on the same reasoning, that they must be recognised in England. In the former case, however, after the hurdle of the law of the domicile has been overcome, the English courts will have to refuse to recognise the German decree if it is based on penal provisions of a nature not recognised in England, or if there has been a patent denial of justice.

(6) THE REPEAL OF NAZI LEGISLATION

In order to complete the picture, it must be pointed out that, although most of this legislation has been abolished since the end of the war, such abolition is not without its problems. A Roumanian law of December 19, 1944, for example,[9] seems to introduce a novel concept of a voidable divorce (? nullity). Article 17 provides that divorces (? nullities) granted between January, 1938, and August 23, 1944, because one or both persons were Jewish, shall be annulled at the request of both if, in the meantime, neither has remarried. This law is reasonable in the sense that it gives the parties concerned an option to bring their divorce to an end or not. More extreme is a Luxemburg decree of March 14, 1945.[1] 'Les jugements du divorce prononcés, pour une cause empruntée à la foi (? loi) allemande et n'ayant aucun équivalent dans la loi luxembourgeoise sont nuls, et de nul effet. Les parties sont remis au même où elles se sont trouvées avant la décision.' On the face of it, this law would seem not to grant any option to the parties, and therefore to nullify a subsequent marriage.[2] The provisions of other countries are not so sweeping. Thus, in Italy, the Decree-Law for the Protection of the Italian Race was simply declared abrogated [3] with effect from October 20,

[8] *Supra.*

[9] Concerning the restitution of Jewish property and re-instatement of Jewish officials and employees. Text in *Restitution: European Legislation to redress the consequences of Nazi rule*, London, 1946, Section XV, p. 1.

[1] *Ibid.*, Section XII, p. 4.

[2] These appear to be the only legislative provisions dealing specifically with this problem.

[3] *Restitution, etc.*, Section X, p. 1. Gazzetta Ufficiale, October 20, 1944, Decree Law dated October 5, 1944, concerning the coming into force of Decree Law of January 20, 1944. But Allied Military Government had previously proclaimed: The Fascist Party will be dissolved and all discriminatory decrees will be annulled. See Smith, 'The Government of Occupied Territory' in *British Year Book of International Law*, Vol. 21 (1944), pp. 151 and 156. Article 31 of the Italian Armistice Agreement provided that all Italian laws involving discrimination on grounds of race, colour, creed or political opinions will, in so far as this is not already accomplished, be rescinded, and the Italian Government undertook to comply with further directions given by the Allied Commander-in-Chief. The

1944. In Germany the basic racial legislation was abolished by the Supreme Commander in his first Law [4] with effect from the day of first promulgation, namely September 18, 1944, and this was re-enacted by the Control Commission [5] which added that no German law enacted should be applied judicially or administratively where such application would cause injustice or inequality by discriminating against any person by reason of his race, nationality, religious beliefs or opposition to the National-Socialist Labour Party or its doctrines. The English courts will, of course, have to regard such changes in the same light as they regard all other changes of foreign law, and no special problems of private international law seem to arise. At all events, proper examination of these laws will have to wait until more is known about them, and about the attitude which the various national courts will adopt towards them.[6]

official commentary says that the Italian Government has of its own volition done all that would have been required under this article. See *Parliamentary Papers*, Italy No. 1 (1945), Cmd. 6693.

[4] *Military Gazette*, No. 3, p. 1. The repeal of the denationalisation decree may give rise to some difficulties in both public and private international law. It is understood that in both the American Zone and in the Kommandatura in Berlin the current view on this problem is that stateless Jewish refugees outside Germany remain stateless or retain the nationality they have acquired in the meantime, that those inside Germany who were German citizens before 1935 automatically re-acquire their German nationality, and that refugees returning from abroad to become permanent residents of Germany are treated as German nationals, even if they have lost their German nationality in the meantime. But the proper solution to these problems will have to await the enactment of a comprehensive nationality law for Germany.

[5] Law No. 1 of September 20, 1945, *Military Gazette*, No. 5, p. 35.

[6] See, for example, *Lewy* v. *Swolinzky*, heard by the Berlin Landgericht on October 1, 1946. This case, which was brought under a provision of the German Civil Code, and not under any 'restitution' legislation, was for the return of property disposed of in an allegedly forced sale. The judgment contained the following significant passage: 'However precarious the claimant's position may have been in July, 1938, there can be no question of a definite "threat" within the meaning of Section 123 of the German Civil Code. The fact that the claimant disposed of his business was due not to actual terror, but to considerations of a general nature, to wit misgivings that business might further slacken, or that the firm would one day have to close down altogether, or even that the Jews would be generally dispossessed by further legislation. Such considerations are frequent in times of distress and disturbance—it is known that property is often sold by its owners for fear of confiscation, or of air raid damage or other effects of the war—without making the transactions voidable on the ground that they have been concluded under duress.

The question whether such threats were illegal must be decided by reference, not to the views prevalent at the time of the judgment, but to those current at the time when the pressure was exercised. The actual threats under consideration occurred in the summer of 1938, with the approval, possibly even on the instigation of the public authority, or of the NSDAP or one of its formations, which, at the time, ruled the State and were the only organs which, through their so-called Fuehrer, made law.

It may be stated as a general principle that the question whether a given act was or was not *contra bonos mores* must be decided in accordance with the views prevalent at the time when the act under consideration occurred. A legal transaction which would clearly reveal itself today as *contra bonos mores* need

(7) CONCLUSIONS

The following conclusions then can be drawn :—

(i) Generally speaking, foreign laws discriminating against Jews fall into the category of penal laws which the English court will not enforce. The courts do, however, show a preference for avoiding the direct issue by use of discretions vested in them over procedure.

(ii) Foreign laws denationalising Jews are of no effect from the point of view of *public* international law in time of war : *sed quære* whether they are of any effect from the point of view of private international law.

(iii) As regards matrimonial law :—

(a) It would be wrong and contrary to the basic principles of English private international law to prevent a marriage contravening racial legislation from being celebrated in England. Until dissolved by the court of the domicile, or by a court recognised by the court of the domicile, such a marriage would be valid for all purposes, including succession, legitimacy of children, change of wife's domicile and so on, and its nullity could not be relied upon as a defence in criminal proceedings for bigamy.

(b) Decrees made by German courts dissolving or annulling, on racial grounds, marriages of which the matrimonial domicile is Germany will have to be recognised by the English courts under all circumstances, even if the marriage was contracted in England. This is the only instance where foreign racial laws will be recognised and enforced in this country.[7]

not have been so at the time when it was concluded. Admitting that the law in operation in 1938 was utterly bad law, and notably that its provisions concerning the Jewish question violated the principles of general human law, it must still be considered that it was permissible in the Hitler State to invoke it and to regard it as existing law.

A profitable transaction, and occasionally even an exceedingly profitable transaction, is not necessarily a usurious transaction '. *Neues Deutschland*, Berlin, October 1, 1946.

[7] On February 20, 1946, the Control Commission promulgated a Marriage Law (Law No. 16: *Military Gazette*, No. 7, p. 110), Part III of which, dealing with actions for mitigation of hardship, seems to be based upon a view similar to this. Sect. 77, sub-s. (1) provides that judicial decisions relating to family rights based on such provisions of the German Marriage Law of July 6, 1938, as are contained neither in the German Civil Code (BGB) nor in this Law, and judicial decisions based solely or predominantly on racial, religious or political grounds may be contested by either of the parties injured by such a decision, as well as by the children of the marriage or by the Public Prosecutor (Action for mitigation of hardship). By sub-s. (3) the contesting party may in such an action claim compensation for material damage inequitably suffered by him and

(c) Decrees made by German courts dissolving or annulling marriages on racial grounds, where jurisdiction to entertain the suit is assumed because the parties are merely resident in Germany will only be enforced in England if all of three conditions are satisfied: (1) the decree must be recognised by the courts of the matrimonial domicile; (2) the procedure must have been such as to have ensured a fair trial; (3) the decree must not have been made on grounds manifestly discriminatory against the defendant. The effect of this is in practice that such decrees are extremely unlikely to be recognised in this country.

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demand the removal or mitigation of such hardships as adversely affect his personal position. But, under sub-s. (4), no claim for restoration of a marriage which has been declared void or has been annulled or dissolved through divorce can be made. Consequently the only effect of this provision is to allow the court to award appropriate compensation for damage inequitably suffered during the period subsequent to the pronouncement of the decision contested and give the contesting party such rights as may be claimed under this law by the innocent party in a divorce suit. This provision seems to apply to any person, regardless of his nationality, who was party to any judicial decision rendered on the basis of the Nazi legislation. But as it does not invalidate any decree of dissolution, it would not appear to entitle a successful claimant under it to any preferential treatment in such matters as 'non-quota' immigration into the United States.

THE CASE OF THE CORFU MINEFIELD

Sixty years ago, a Balkan incident like the mining of the destroyers in the Corfu Channel would probably have led to an immediate British ultimatum to Albania, with limitless vistas of punitive war and Great Power intervention on opposite sides. This was in the days before observance of international law had developed into the standard of conduct for civilised States, and it is a mark of the advance made in at least some directions that the damage and loss of life last October were not followed at once by anarchic reprisals, bombardments of the Albanian coast, and demands for indemnities. Instead, Britain submitted the facts to the third party judgment of the Security Council of the United Nations, and, when the Russian veto blocked a decision in her favour, allowed the dispute to go before the International Court, thus transforming a serious political embroilment into a legal issue, and incidentally giving a lesson in the way to stop war. The British claim that the decision must rest on the simple question whether or not Albania laid the mines, or knew that they had been laid, everything else being irrelevant. As in all other legal systems, this problem has to be solved by evidence, but we already know a great deal about the allegations of the contending parties, whose cases were elaborately investigated by a subcommittee of the Security Council, and the object of this article is to give an account of the contentions on each side, together with some observations on the procedure in this first international lawsuit since the foundation of the United Nations. For the facts which follow, the writer is indebted to the *United Nations Weekly Bulletin*.

1. *The admitted facts:—*

On October 22, 1946, the British cruisers *Mauritius* and *Leander*, accompanied by the destroyers *Saumarez* and *Volage*, were moving northwards in the Corfu Channel between the island of Corfu on the west and the extreme southern part of the Albanian mainland on the east. The ships were close to the Albanian coast, not far from Saranda, when their crews heard the firing of machine guns from the shore. The shots missed (as perhaps was intended), but were followed by a severe explosion on the *Saumarez*, which so crippled her that

the *Volage* had to take her in tow. An Albanian launch then came out from Saranda under the white flag, and asked the *Saumarez* why the ships were in the channel. The reply is not recorded. For about half an hour the launch kept observation, without attempting to help. Soon after her departure there was another big explosion, this time on the *Volage*, whose whole forepart was destroyed. The damaged ships struggled against the danger of driving ashore on the Albanian coast in the west wind, but ultimately made Corfu, the *Saumarez* being a total loss. Forty-four sailors were killed and forty-two injured.

So far the unchallenged facts; the rest is controversial, the burden of proof resting on Britain.

2. *Facts in dispute.*

(a) *The cause of the explosions.*

When the case was before the Security Council, Britain claimed that the damage was due to contact mines; this is proved both by the nature of the explosions and the damage to the destroyers, and the allegation was not seriously challenged by Albania.

But how did the mines get into the channel? Britain's case is that either (1) Albania deliberately laid them in peacetime to destroy shipping, or (2) connived at their being laid by unknown agents, or (3) knew that they had been laid, and refrained from giving warning to the world. That any one of these actions would be an international crime is established by Article 1 of Hague Convention VIII of 1907, which forbids the laying of unnotified minefields. This Convention was merely a declaration of already existing general law, and it could hardly be argued that any State, in any circumstances, has a legal right to lay an unnotified minefield in peacetime. The conception that such an action would be 'an international crime' comes from the decisions in the Nuremberg Trials, where breaches of the Hague Conventions were held to be crimes, for which individual offenders could, and should, be punished. But in any event all the charges are denied by the Albanians, who have not claimed a right to lay mines in peacetime, and have not suggested that such a step would be anything but a grave crime.

At this point one can temporarily leave aside all the complicated questions raised by Albania about the legal nature, and the true course, of the Corfu Channel, the right of 'innocent passage', the events before October 22, and the general allegations of British hostility. Britain claims that no excuse,

however well founded, would justify a State in laying a minefield in peacetime, or conniving at such an action. What are the facts relied on to justify this serious charge that Albania deliberately contrived the mining of the destroyers?

(b) *The British evidence that Albania laid the mines, or connived at the laying.*

Immediately after October 22, Britain reported what had happened to the Mediterranean Zone Board of the International Mine Clearance Association, and on or about October 28 that Board recommended a check sweep. Following this there are disputed questions about the decision of the Central Board (to be discussed later), but it is common ground that on November 12 and 13 British forces carried out extensive operations in the channel. Here again there are disagreements as to what happened, but the British evidence is that twenty-two mines were found; many of these were sunk by rifle fire, others drifted ashore, and two were preserved. (Later they were used as exhibits before the Security Council.) They were of the German 'Y' type, containing 600lb. of explosive, the largest moored mines in existence, capable of causing enormous damage. This minefield (for it was no less) extended for three miles along the channel in the path of ships of all nations. That it had been laid within the previous six months was shown by the absence of rust and marine growth, by the easy unscrewing of the horns, by the new paint and clearly visible identification marks, and by the grease on the mooring wires. The British therefore claimed that this was not a case where the ships had run against drifting mines but that they had been injured by a minefield 'deliberately, recently, and secretly laid'. It was a moored minefield in Albanian territorial waters, undeclared and unnotified, reaching as close as 300 yards from the shore. (Later, this figure of 300 yards was amended by the British, after criticism of their chart, to somewhat less than 500 yards, but the difference is immaterial.) The actual laying of mines is said to take only about fifteen minutes for eight mines to be put down by one minelayer. The minefield might have been a sea defence for Saranda, or to block the channel, or to force ships from the coast. In the opinion of Commander Sworder, of the British delegation, it would have been impossible to lay mines so close to the shore without attracting the attention of the local Albanian population. No newly laid moored minefield had been discovered anywhere except in the Corfu Channel, and statistics of ships

blown up accidentally by mines elsewhere since the war were irrelevant.

During the war the channel was mined. It was swept twice in 1944, once by the Germans and later by the Allies. Further to the west (nearer to Corfu island) old German minefields still existed, but these were not a risk in the swept channel. Anti-mine devices were not being used by the British ships during their passage, although the crews were at action stations owing to previous incidents with the Albanians. Floating mines from the old German minefield or elsewhere could be ruled out because the weather was clear, the ships were proceeding slowly, and floating mines were easily spotted. It would have been impossible for mines to drift for the necessary distance with sinker, cable and accessory gear. Had they broken loose, they would have come to the surface and become floating mines. Ground mines were also out of the question because at that point the water was too deep (thirty fathoms), and no ground mines, necessarily actuated by magnetism or sound, would operate at that depth. No old German mines were found during the sweep of November 13.

The British also attached importance to the use of the white flag by the Albanian launch. This has the international significance of a flag of truce during hostilities, and its use was taken to mean that the Albanians knew that they had committed a hostile, warlike act and wished a truce.

(c) *The Albanian answer to this evidence.*

The Albanians, supported by Poland and Russia, denied that they had laid the mines, and said that they did not know whether or not there were mines in those waters. They had no mine-laying craft. On October 29 three UNRRA barges passed through the alleged minefield undamaged. If there were mines Albania did not know who had laid them. She was not responsible for the safety of navigation in her territorial waters. The mining of ships had occurred elsewhere, even in places considered to have been cleared. German mines could be found almost anywhere in Europe. There was no evidence that the fragments of the mines which caused the explosions on October 22 were identical with those found during the sweep on November 13. There was, however, the old German minefield in the vicinity, and the explosions could have been caused by floating mines or by those remaining from a previously swept field. There was a possibility that the destroyers had been blown by the wind into remnants of the old German field.

There was a further possibility that some other State, interested in provoking bad relations between Britain and Albania, had laid the minefield between October 22 and November 13 without Albania's knowledge. While not implying that Yugoslavia had done this, there were three dumps of this kind of mine (totalling 2,000) in Yugoslavia. There were similar dumps in Greece and elsewhere.

Asked by the sub-committee whether he thought it technically possible, under cover of darkness, for a third party to have laid the mines without the knowledge of the Albanian authorities, the Albanian representative answered that a vigilant guard had been organised along the coast, but that this had not been able to prevent Greek ships from entering Albanian waters on provocative missions. The possibility of mine-laying without Albania's knowledge was not, therefore, excluded.

On this point the Polish representative asked the Greeks if their vessels, military or otherwise, had passed through the channel between October 22 and November 13. The reply was that the Greek authorities considered the channel a normal route, and had therefore used it. The Albanians also alleged that on October 23 three British aircraft flew over their territory ' in menacing fashion ', but this was denied by Britain.

(d) *The British answer.*

Very naturally, the British stressed the Albanian admission that mines might have been laid without their knowledge, and asked whether, if Albania had not laid the mines, anyone could believe that they were laid without her knowledge and connivance? This was impossible. If they knew about them and did not report them, or even issue a warning, they were accessory to the crime.

There were no German mine dumps in Greece. Greece had no mine-laying vessels. No Greek warships had passed through the channel since May, 1946.

It was believed that the three UNRRA barges were of sufficiently shallow draught to pass over the mines.

As to the suggestion that the warships might have been blown out of the swept channel on to the mines, the reply was that modern ships do not get seriously deflected from their course by a 15–20 m.p.h. wind, but that in any event the wind was not blowing in the right direction for this to have happened. Had the ships been blown by the wind, they would have gone to the east, where there were no old German mines; these lay to the west.

(e) *The report of the Security Council Sub-Committee.*

The sub-committee chairman (Dr. Angel, of Colombia) defined the issues as follows:—

(1) Was there a minefield in the swept channel opposite Saranda Bay on October 22, 1946?

(2) Was this minefield laid by Albania, or with her connivance?

The sub-committee, consisting of the representatives of Australia, Colombia and Poland, took the view that the Albanian counter-charges did not arise until the British charges were established. If established, it would then be necessary to see whether those counter-charges eliminated, reduced or shifted the responsibility.

The sub-committee examined delegates from Britain and Albania, and also wished to see Captain Mestre (of the French Navy), who had been present as an observer at the sweep, but this was not possible as the French could not give him leave to attend at New York.

All the members agreed that the damage had been caused by mines, but they could not agree whether the offending mines were part of the minefield found during the sweep. They therefore reached no decision on the responsibility of Albania, whether by direct act, connivance, or knowledge. The division of opinion rested between Australia and Colombia on one side and Poland on the other. Dr. Angel said that he had no doubt that the mines were in the swept channel, and had been recently laid there, certainly not more than six months before. The mines which caused the damage on October 22 were part of the field found on November 13. It did not seem probable that, during the brief intervening period, the British, or a third party, could have laid the mines at a very short distance from the coast, thus throwing open the door to a possible denial that the mines found on November 13 were identical with those causing the explosions. He did not believe that the British Navy invented the existence of the field, or laid it, or that it was laid, unnoticed, by a third power.

But there was no direct evidence to prove beyond doubt that the mines were laid by Albania, or with her connivance. Nevertheless, there was a strong presumption that they could not have been laid without her knowledge.

This was also the view of Australia. While there was no direct evidence to prove who laid the mines, the Council would be justified in finding that they must have been laid with

Albania's knowledge and that there was a strong probability that they were laid with her connivance.

As against this, the Polish representative contended that none of the facts warranted the conclusion that the mines were laid by Albania or with her connivance. What position was taken up by Poland on the further question (of Albania's knowledge) is not clear.

After the sub-committee had reported back to the Security Council the resolution condemning Albania was vetoed by Russia. Those in favour of the British case were Australia, Belgium, China, Colombia, France and the United States; against were Poland and Russia; Syria abstained. As a party to the dispute, Britain did not vote. It was at once pointed out that this exercise of the Soviet veto raised grave considerations for the future.

On April 9 the parties were referred to the International Court, where there is no veto.

3. *Collateral issues.*

(a) *The nature and extent of the Corfu Channel.*

Britain claims that this channel is ' an international highway between two parts of the open [Adriatic] sea, lying in [Albanian] territorial waters ', and that the object of the passage of the ships on October 22 was to pass by the quickest and most convenient route from one place to another. The channel is said to be perfectly well known and recognised. The British suggestion is that the old German minefield near the Corfu coast to the west made it necessary for ships to keep fairly close to the Albanian coast, but that, apart from this, such a course was both necessary and reasonable, as the area nearer Corfu is dangerous and rocky, whereas there is deep water at Saranda. It is claimed that shipping in this region has always passed near Albania.

The British also say that proof or disproof of the foregoing facts has no bearing whatever on the alleged action of Albania in mining the channel; that the laying of mines could never be excused by any trespass, however serious, on waters which are an Albanian preserve. The proper remedy for trespass would be diplomatic action, complaint to the United Nations, or proceedings through the Court. Naturally, the Albanians themselves have not taken up the position that they would be justified in laying a minefield because of infringements on their rights in the channel, and it is not clear what bearing the dispute about the channel has on the British case.

But this aspect of the question was vigorously raised and pressed by Albania, Russia and Poland. Albania alleges that ships of other nations have no right to pass through, and that an International Mixed Commission (including Albania) should determine once and for all the route of the channel for free navigation. It was even suggested, on behalf of Britain, that the Albanians feel so strongly on this point that they adopted the most drastic means (a minefield) to destroy ships trying to sail through. This, of course, is denied.

The Albanians say that the distance between the Corfu coast and Saranda is a little over seven miles. The ordinary channel of navigation is not, said the Albanians, at 1,500 metres from Saranda, where the incidents occurred. Before the war the channel was limited in use to coasters and ships of neighbouring countries and was not (as claimed by Britain) an international channel of navigation. It was only since the end of the war that Britain had begun to use the channel in this way.

It was also alleged (by Russia) that the British had repeatedly edged the channel closer to Albania, and that the fairway where the destroyers were damaged was not the fairway swept in 1944.

The British replied that this is in fact an international channel, that the statement that the fairway where the destroyers were damaged did not coincide with the swept fairway is untrue, and can be proved to be so, and that this very channel was swept in 1944.

(b) *Incidents before October, 1946.*

Albania alleges that in a British communication of January 25, 1945, it was stated that the channel was not safe, and that ships navigating there did so at their own risk.

On May 15, 1946, two British cruisers sustained fire from Albanian shore guns while traversing the channel. Apparently the shots either missed, or were not deliberately aimed at the ships. For fear of subsequent trouble, the cruisers were ordered by the Admiralty not to return the same way.

Of this incident the Albanian version is that two unknown warships, without flags, sailed close to the coast near Saranda, and were warned by the coastal authorities to go out, but refused to comply, after which a few warning shots were fired. It was only then that the British ensign was hoisted. Britain denies this allegation about the absence of a flag.

There is some reason to think that the coastal batteries fired in the mistaken belief that the cruisers were Greek, though

why this should justify the action is unexplained. The British protested at the time, and Albania apologised, but still claimed that the ships had been too near the coast. In a note of May 29, 1946, Albania declared that she respected the right of 'innocent passage', but could never tolerate a situation in which the waters of Saranda were considered an international channel of navigation. She asked Britain to give previous warning of any passage of her ships in Albanian territorial waters. During the hearings before the Security Council, the British representative remarked that he could not see what bearing this request could have on the existence of a minefield, unless the inference was meant to be drawn that in May, 1946, Albania was laying a minefield. Similarly, on behalf of Greece, it was stated that a Yugoslav ship made a weekly trip to Saranda, but suddenly stopped on or about September 26, 1946, which gave colour to the view that Albania warned the Yugoslavs before laying mines.

The Albanians said that the warning that ships should not enter their waters without prior notice had been called for by the circumstances, and by the continual provocation of Greek vessels, and to anticipate and prevent undesirable incidents. But Albania did not need to take defensive measures by laying minefields. The United Nations should protect her. For this reason she had appealed on October 29, 1946, asking for action against those who were infringing her national sovereignty. Why, she asked, had no steps been taken?

It was also alleged by Albania that Britain had supported and encouraged Greek claims on Southern Albania, had opposed her rights at the Paris Conference, had taken an unjust attitude when she applied for membership of the United Nations, had aided quislings and war criminals, and by this attitude had demonstrated her lack of friendship for the new Albanian democracy.

All these charges were duly denied by Britain, whose representative said that they were irrelevant, but that they showed a degree of unexplained hatred quite adequate to supply the hitherto missing motive for trying to blow up British ships.

(c) *The law of territorial waters.*

As is well known, varying claims are made to control areas of the sea, but it would appear that in this case there is no need to examine these, inasmuch as it is admitted that the explosions occurred in Albanian territorial waters. This expression means that the territorial waters are under Albanian

sovereignty, but does not imply that the Albanians therefore have a legal right to impede sea traffic through those waters. This leads to the question of ' innocent passage '.

For very many years it has been international practice to allow ships of other States to pass without let or hindrance through territorial waters. This is particularly true of straits (such as the Corfu Channel) which connect two portions of the open sea. The practice is so well-established that it has the force of international common or customary law. One of the most recent statements on the subject is the Report of the Second Sub-Committee of the Hague Committee on Territorial Waters (1930) which drafted the following suggested article :—

> ' Under no pretext whatever may the passage even of warships through Straits used for international navigation between two parts of the high sea be interfered with.'

But it could hardly be established that there is an absolute right of passage through territorial waters, if for some reason the home State objected to the passage as not being ' innocent ', and the present-day position is that the home State appears to be the sole judge of what is ' innocent ' passage, particularly in the case of foreign warships. These interesting questions hardly arise for decision in the present case, first, because it is hard to see their bearing on the responsibility for the minefield, and, second, because the Albanians do not deny the right of innocent passage, but claim that the passage on October 22 was not innocent, although, as stated already, they do not go to the length of suggesting that any amount of lack of innocence would give them the right to mine ships.

Reference was also made in the Security Council to the Convention and Statute on the Regime of Navigable Waterways of International Concern, made at Barcelona in 1921, to which Albania was a party. Under Article 2 of this Convention, with certain restrictions, each of the Contracting Parties ' accords free exercise of navigation to vessels flying the flag of one of the other contracting States on those parts of navigable waterways ' (defined) ' as may be situated under its sovereignty or authority '. Under Article 10 : ' Each riparian State is bound to refrain from measures likely to reduce the facilities for navigation, and undertakes to remove any obstacles and dangers to navigation which may occur '.

The Corfu Channel is a waterway within the meaning of this Convention, and there is nothing to restrict its operation to

merchant ships. But, said the British, it was sheer accident that warships, and not merchant ships, hit the mines.

(d) *The circumstances under which the minefield was swept in November,* 1946.

Before the Security Council, it was argued by Albania, Poland and Russia that the minesweeping of November 12 and 13, 1946, was in some way illegal. It is not easy to see what bearing this has on the responsibility of Albania for the preceding incidents, but, as this question will no doubt be strongly pressed before the Court, an outline of the contentions of the opposing parties should be given.

The Albanian allegation is that the British had no right to sweep, and that the sweeping itself was improperly carried out. It is claimed that, after the Mediterranean Board had recommended a check sweep (as previously mentioned) this recommendation was submitted for confirmation to the Central Board, but confirmation was refused.

Sir Alexander Cadogan (for Britain) said that on November 1, the Central Board unanimously decided that the North Corfu Channel (the channel in question) should be reswept at a favourable opportunity, and that it was on the basis of this decision that the Allied Commander in Chief in the Mediterranean carried out the sweep on November 12 and 13. The reason why only British forces were used was that these were the only forces available, but Captain Mestre, of the French Navy, attended as an observer.

As against this, Mr. Gromyko, for Russia, said that the phrase ' a favourable opportunity ' or ' at the first favourable opportunity ', had apparently been assumed by the British to mean that there was no obligation to ask Albania's consent, and, further, that the Central Board had met again on November 14 (immediately after the sweep) and had resolved that the sweeping was carried out ' without its agreement or consent '.

To this, Sir Alexander replied that the resolution of November 14 represented the views of the members during that meeting, but the statement was suspended within an hour afterwards, and all members were informed. Another meeting was held on November 19, but at no time had there been any reversal of the decision of November 1, which was the only operative decision.

The facts of this are obscure. The Polish representative

said that the Mediterranean Zone Board had agreed to ask the concurrence of Albania for a check sweep of those parts of the ' Medri ' routes (the Corfu Channel) which passed through Albanian territorial waters, and that the Central Board had decided that the clearance of mines from the Channel should be carried out, but only after the approval of Albania had been obtained. Further, that Britain and Greece had rejected the Yugoslav and Russian proposal that Albania should be invited to participate in mine clearance of her coastal waters. Finally, that the Mediterranean Board had laid the responsibility for minesweeping the channel on Greece, but the Commander of the British Naval Forces unilaterally ordered Greek forces to other tasks.

The complaints about the actual manner of the sweeping were that, as alleged by Albania, on November 12, early in the morning, a large number of warships flying the British flag cruised in all directions close to the southern Albanian coast, between Butrinto and Karaburun.

On November 13 also, from 10 a.m. and throughout the day, a number of British warships penetrated the waters of Saranda to a distance of 500, 1000 and 1,500 metres from the Port, under pretext of minesweeping, firing continually in all directions. Further, the French Naval officer, Captain Mestre, who was present as an observer, was invited by the British without the knowledge or authorisation of the Mines Clearance Board.

The British replied that the minesweeping was legally authorised, and that the firing was for the purposes of mine-clearance, and was neither excessive nor improper, nor did it create any danger for those on shore.

4. *The Reference to the International Court.*

(a) *The international legal grounds for the reference.*

As is well known, the International Court, like its predecessor the Permanent Court of International Justice, has two types of jurisdiction (a) to try contested cases between sovereign State plaintiffs, defendants and third parties, and (b) to give Advisory Opinions on legal questions (in the nature of declaratory judgments) at the request of the General Assembly, the Security Council, or certain specialised agencies of the United Nations. (This power to request Advisory Opinions arises under Chapter XIV, Art. 96 of the Charter, and was not used in the present case.)

The first point to be noticed is that the dispute has not been sent to the Court by the Security Council; the decision was that 'the United Kingdom and the Albanian Governments should immediately refer the dispute . . .' to the Court. Thus the starting of legal proceedings is left to the parties, in accordance with Chapter VI, Art. 36 (3), of the Charter. The case falls within the jurisdiction by Article 36 of the Court Statute, which provides (inter alia) that 'the jurisdiction comprises all cases which the parties refer to it'. Hence there is no question of compulsory trial.

What happens if Albania refuses to appear? Such an event is perhaps hardly to be anticipated, but, under Article 53 of the Statute, 'whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37' [the latter not being relevant] 'but also that the claim is well founded in fact and in law'. The League Court, armed with similar powers, never had to use them, in all the numerous important contested cases in its history. The *Eastern Carelia Case* (reported 1923 Series B., No. 5) is not in point, because that was a request by the League Council for an Advisory Opinion, and the Court decision, against proceeding in the absence of Soviet Russia, was based on absence of Soviet consent to the jurisdiction, such consent being necessary when a sovereign State, not a League Member, was involved in litigation. It is true that Albania is not a member of the United Nations, but she accepted the obligations of membership when she consented to take part in the debates before the Security Council (Chapter V, Article 32, of the Charter) and it is this point which differentiates the present case from that of *Eastern Carelia*. Technically, Albania could not have been summoned by Britain before the Court prior to the proceedings before the Security Council, or, at any rate, she could have refused to take any notice of the summons, but the legal position is clear that she now is bound both by the Charter and the Court Statute, and presumably the Court (which decides its own jurisdiction, by virtue of Article 36 (6) of the Statute) would hold that it was properly seised of the case.

(b) *Preliminary objections before the Court*

As so often happens in judicial systems which are, so to speak, just finding their feet, preliminary objections of a

highly technical nature were often raised before the Permanent Court, objections of a type hardly to be put forward, much less entertained, in a national tribunal. It should also be said that these objections did not often meet with much success! Now it is to be expected that similar practices will prevail in the new Court, and the Security Council discussions are a clear warning that Albania will contend that Britain has no right to be heard, because she has not previously exhausted the various procedures for pacific settlement outlined in Chapter VI, Art. 1, of the Charter. This was investigated by the Council, where the majority of the Powers saw nothing in the point; the British explained that diplomatic notes had preceded the appeal to the United Nations, but that the Albanian replies showed no hope of amicable settlement. Inasmuch, however, as the same point may again be raised before the Court as a ' plea in bar ', it can be mentioned that the old Permanent Court repeatedly held that an alleged failure to exhaust the resources of peaceful negotiation could not be a fatal obstacle to the bringing of an action (see, for instance, the case of the *Mavrommatis Palestine Concessions*, Judgment No. 2, Series A, No. 2, pp. 6–93).

(c) *Procedure*

The hearing is in public, unless otherwise decided (Statute, Art. 46); ' discovery ' takes place on both sides (Art. 43 (2)); oral and documentary evidence can be given (Art. 43 (1) and (4)); reasons are announced for the judgment (Art. 56). The Charter (Chapter XIV, Art. 94) provides means of enforcement of a decision, though no case occurred before the former Court where a State declined to carry out a judgment.

Hector A. Munro.

THE NEW PUBLIC CORPORATIONS AND THE LAW

(continued)

8. THE LEGAL STATUS OF PUBLIC CORPORATIONS

I. Corporate Character

SUBSTANTIALLY similar provisions in all the Acts provide for the establishment of the public corporation as ' a body corporate . . . , with perpetual succession and a common seal and power to hold land without licence in mortmain '.[1]

II. Legal Duties and Liabilities

A number of provisions indicate the legislative purpose of putting the public corporations on substantially the same footing as private companies. One series of provisions refers to liability for taxes and other dues : ' Nothing in this Act shall be deemed to exempt the Board from liability for any tax, duty, rate, levy, or other charge whatsoever, whether general or local '.[2]

Another set of provisions stipulates full liability of the public corporations in actions, proceedings or prosecutions, and it removes them from the Public Authorities Protection Act. A limited privilege is provided however, through the reduction of the normal limitation period of six years, (ss. 2 and 3, Limitation Act, 1939) to three years.

Only in the case of the Central Land Board is it provided that its functions ' shall be exercised on behalf of the Crown '. This presumably means that it partakes of privileges of the Crown in respect of liabilities in contract, tort, etc. The significance of this provision will be greatly lessened by the enactment of the Crown Proceedings Bill which makes the Crown generally liable in tort and contract. Variously worded

[1] 1. S. 2, Coal Industry Nationalisation Act.
2. S. 2, New Towns Act.
3, S. 3, Electricity Bill.
4. S. 65, Agriculture Bill.
5. S. 2, Town and Country Planning Bill.
6. First Schedule to Transport Bill.
7. Third Schedule to National Health Service Act.
8. First Schedule to Civil Aviation Act, s. 12.

[2] Cf. s. 6, Civil Aviation Act; s. 11, Electricity Bill.

provisions finally state that 'No provision of this Act conferring any power or imposing any duty . . . authorises the disregard by the corporations of any rule of law whether having effect by any virtue of enactment or otherwise'.[3]

Another formula, more specifically referring to capacity, is that 'the authorisation conferred on the board by section 1 of this Act, whilst discharging them in the exercise and performance of the functions therein mentioned from limitations to which they might otherwise be subject arising from the law relating to the capacity of statutory corporations, are not to be construed as authorising disregard of any enactment or any act or omission unlawful on any other ground'.[4]

The purpose and effect of these provisions is far from clear. In so far as they presuppose that the ultra vires rule has no application to the public corporations, such an assumption is probably erroneous (see below under 10), and the only real meaning can be that the carrying out of the manifold public functions entrusted to the public corporations does not authorise any disregard of vested rights, or other protected interests, except in so far as the Act specially authorises it.

9. THE PUBLIC CORPORATION AS A PUBLIC AUTHORITY

Nothing illustrates the unique character and position of the public corporation as much as the difficulty of its proper classification. Three alternatives present themselves:—

(a) In so far as all public corporations are, to a greater or lesser degree, subject to ministerial directions and are integrated in the general nationalisation policy, they might be regarded as part of the Executive, as Departments of Government.

(b) On the other hand, the obvious policy of assimilating the public corporation to private companies as regards legal liability, auditing, etc., might suggest the conclusion that they are essentially of the nature of commercial companies.

(c) Finally, they might be regarded as statutory public authorities, similar to local authorities or special public authorities. There is, however, a decisive difference, constitutionally and legally, between such statutory public authorities and the Government.[5]

Although the ministerial powers of appointment and direc-

[3] *E.g.*, s. 6 (2), Civil Aviation Act.
[4] Section 4 (4), Coal Industry Nationalisation Act. Yet another formula is used in the Transport Bill, s. 2 (5).
[5] Cf. Robinson: '*Public Authorities and Legal Liability*', p. 22 *et seq.*

tion and accountability to Parliament for the policies of the public corporation strongly support the first alternative, this is countered by the even stronger argument that the very purpose of the conduct of nationalised industries by public corporations is their separation from Government Departments. Although the public corporation is politically and, to some extent, economically, a Government responsibility, it should not be legally identified with the Government.

Even less is to be said for the assimilation of the public corporation to the ordinary commercial company. Although there is a certain similarity in form, the public corporations are essentially instruments of public policy under the direction of the Government whch is responsible to Parliament. The public function overshadows the private form but even the formal similarity is limited, because of the absence of private shareholders and the appointment of the managing board by the minister. This distinguishes the public corporation from certain types of companies, such as railway companies which have, by statute, certain semi-public functions and are subject to some supervision.

There remains the classification of the public corporations as public authorities of a special character. Although the application of the Public Authorities Protection Act is specifically excluded, various provisions indicate that the public corporations are to be regarded as public authorities. Thus section 5, Transport Bill, specifically describes the executives operating under the Transport Commission as 'Public Authorities'.

Various provisions in the New Towns Act put the development corporations on the same footing as local authorities. The parallel between public corporations and local authorities should not, however, be carried too far. The local authorities are definitely subordinate public authorities but their status position and functions are regulated directly by the law. They are not under the immediate direction of the Minister, although the Government exercises control, through grants, inspections, the right of sanctioning plans and schemes, and other supervisory functions. The public corporations, on the other hand, are a direct instrument of national policy although they are given far-reaching legal and functional autonomy.

10. ULTRA VIRES CONTROL

The extent of the ultra vires jurisdiction of the courts over the public corporations is more than a technical or academic

legal problem. It is through its ultra vires jurisdiction that the judiciary asserts its function of protecting the citizen against encroachments of the executive and public authorities, both in their capacity as legislators by delegation and as quasi-judicial authorities. In the United States, the function of the Supreme Court as the guardian of the Constitution, has produced a dangerous tension between the legislator and the judiciary which reached its climax in the judicial invalidation of important parts of the New Deal legislation and the subsequent series of new appointments to the Court by President Roosevelt.[6] In Britain, too, the ultra vires question has provided some material for conflict between Legislature, Executive, and Judiciary but it has been kept in bounds by the self-restraint of the judiciary and the British constitutional system. With the gradual growth of delegated legislative powers and the vast extension of public activities in the economic and social field, the dangers of a more acute conflict increase. The whole problem is made more complicated by the doubts which pertain in regard to the extent of the court's powers of supervision over the administration.[7]

As corporate bodies, the public corporations are subject to the ultra vires limitation on contractual capacity[8] and on tortious liability.[9] As public authorities, forming part of public administration, they are subject to the supervisory powers which the courts as guardians of the law of the land exercise over administrative authorities.[10]

The 'powers' clauses in the Acts constituting the public corporations are therefore likely to be read by the courts in the light of this double limitation. Their width and elasticity, which is analogous to the technique of most modern memoranda of association, may not serve as a protection against the tests which the courts apply to the exercise of administrative powers.

What are these tests? Despite the extreme difficulty of extracting clear principles from the welter of decisions, it is submitted that the two main causes of invalidity for ultra

[6] See on this problem :—Swisher, *The Growth of Constitutional Power in the United States*, 1946; Haines, *The Revival of Natural Law Concepts*, 1929; Friedmann, *Legal Theory*, pp. 53–58.

[7] For a recent survey see :—Treves, 'Administrative Discretion and Judicial Control', 10 Mod. L. Rev., 276 *et seq.*

[8] *Ashbury Carriage Co.* v. *Riche*, L.R. 7 H.L. 653.

[9] The view, first developed by Salmond (Torts, cf. 10 ed., s. 13), that the ultra vires rule ought not to apply to torts committed by those representing the corporate body (as distinct from servants) now rightly finds increasing support (*e.g.*, by Winfield, Tort, § 26, Welsh, 62 L.Q.R. 345, at pp. 351, *et seq.*).

[10] Kahn-Freund (9 Mod. L. Rev., 237) appears to suggest that only in the latter capacity, the Public Corporations are subject to ultra vires control.

vires are Excess of Power (*excès de pouvoir*) and Abuse of Power (*détournement de pouvoir*). The first means checking legal acts by the terms of the enabling statute, the second means a check on administrative discretion where motives alien to the administrative purpose have prevailed.

The position is much confused, however, through the nebulous test of 'reasonableness' which the courts apply to administrative actions.

Excess of Powers

While, with the exception of the Transport Bill, all public corporations, and in particular the commercial public corporations, are given a wide margin of discretion, through the power to do anything 'calculated', 'designed' or 'conducive' to their main objectives, the formulations are sometimes cast in an objective, sometimes in a subjective form. (See above, pp. 244 *et seq.*)

The objective form might lend itself more easily to judicial scrutiny if the courts take the attitude that whether any action is 'calculated' or not or 'conducive' is a matter for examination by an independent authority, that is to say, the courts as guardians of the law. This interpretation was put forward by Lord Atkin in his famous dissenting judgment in *Liversidge* v. *Anderson*, [1942] A.C. 206, 232. It was rejected by the majority of the House of Lords, which interpreted the formula in the Defence Regulations: 'Where the Minister . . . has reasonable cause to believe' as meaning in fact: 'Where the Minister is satisfied that it is reasonable to believe'. This judgment of the majority might well be held to preclude the judiciary from examining the capacity of the public corporations in relation to the general functions clauses just cited. This conclusion is, however, subject to two objections: firstly, it may be argued that the public corporation is in the same position as the Minister of the Crown but is under the stricter limitations of a statutory authority. Secondly, it may be argued that the far-reaching discretion left to the Minister in the interpretation of the Defence Regulations does not apply to commercial activities in peace time. This view was taken by Henn Collins, J., in a recent case.[11]

The Town and Country Planning Act, 1944, provides that, 'Where the Minister of Town and Country Planning . . . *is*

[11] *Phœnix Assurance Co.* v. *Minister of Town and Country Planning*, 63 T.L.R. 139.

satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land continuous or adjacent thereto, should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such part of their area to be land subject to compulsory purchase . . . may be made by the Minister '.

Despite this quite unambiguous formulation and compliance by the Minister with the procedure prescribed in the Act, Henn Collins, J., quashed the City of Plymouth (City Centre) Development Order, 1946, made by the Minister on the application of the local planning authority. The learned judge thought that the ' satisfaction ' of the Minister meant satisfaction ' on reasonable grounds ' of the facts to which this action refers. His decision was quashed by the Court of Appeal.[12]

If judicial supervision over ministerial discretion of the kind claimed by Henn Collins, J., were held to be correct,[13] the courts could undoubtedly claim an even more emphatic right of control over the reasonableness of the powers exercised by statutory corporations such as the public corporations, whether the discretion granted to the public corporation is expressed in an objective or in a subjective form.

Few questions are more obscure in English law than the meaning of reasonableness for the purpose of judicial control over the powers of public authorities. In *Kruse* v. *Johnson*[14] the court limited reasonableness to scrutiny of motives and abuse of powers. The examples given by Lord Russell were partiality and inequality of bye-laws, manifest unjustness, bad faith, oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men. In *Westminster Corporation* v. *L.N.E.R.*[15] Lord Macnaghten stated three separate requirements: ' It must keep within the limits of the authority committed to it.

[12] *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851.

[13] This is contrary to the tendency of the dictum by Scott, L.J., in *Sparkes* v. *Ash*, [1943] 1 K.B. 223, 229: ' If it is a duty of the courts to recognise and trust the discretion of local authorities, much more must it be so in the case of a Minister directly responsible to Parliament and entrusted by the constitution with the function of administering the department to which the relevant field of national activity is relegated? ' Wade & Phillips, *Constitutional Law*, 3rd ed., p. 278, criticise this dictum for its implication that there could be any judicial control of a court over the reasonableness of ministerial executive discretion.

[14] [1898] 2 Q.B. 91.

[15] [1905] A.C. 426

It must act in good faith and it must act reasonably'. The last proposition is involved in the second, if not in the first.

This seemed to mean that the courts were limited to an examination of excess of power and of improper motives. But this interpretation was gravely upset by the deplorable decision of the House of Lords in *Roberts* v. *Hopwood*.[16] In that case the House limited the apparently clear statutory power of a Borough Council to fix wages 'as they may think fit' by the test of reasonableness. A scale of wages fixed above the current level and including equal pay for male and female employees was held to be 'unreasonable' and the district auditor's surcharge was upheld. Lord Atkinson thought this highly unreasonable because the council 'allowed themselves to be guided in preference by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages and quality of labour'. A very different attitude was taken by the Court of Appeal in a recent case.[17] The Birmingham City Council had resolved to increase the war bonus for its employees and to pay children's allowances to married men, widowers and widows. The district auditor disallowed the sums provided for this purpose as not being salary or remuneration within the Local Government Act and not relating to services. The Court of Appeal unanimously decided that the decision of the city council should not be interfered with. Du Parcq, L.J., obviously found difficulty in extracting clear principles from *Roberts* v. *Hopwood*. He saw the essence of the decision in the principle that a local authority cannot be said to have acted in the lawful exercise of its discretion to fix wages when it grants to its employees, nominally as wages, amounts arrived at arbitrarily without consideration of any of those matters which an employer acting reasonably, would normally take into account. The learned Lord Justice continued: 'As I understand the decision it does not show that expenditure may properly be disallowed whenever the local authority's reasons for the expenditure are ill-advised, stupid or even (it may be) dishonest'.

In regard to the last proposition, it is submitted that the learned Lord Justice was mistaken. Dishonest motive (*détournement de pouvoir*) has consistently been held to be the

[16] [1925] A.C. 578.
[17] *Re decision of Walker*, [1944] K.B. 644.

subject of judicial supervision.[18] But the further reasoning of du Parcq, L.J., like that of Scott, L.J., in *Sparkes* v. *Ash*, rightly lays emphasis on the necessity for extreme restraint and reluctance of the courts ' before they attempt to determine how, in their opinion, discretion ought to be exercised '.

The learned Lord Justice had no difficulty in showing that regard to the modern practice of many private employers, the growth of collective bargaining, and the principle of responsibility of elected bodies to the electors, made it impossible for the court to interfere with the decision of the Birmingham City Council. The same principle has been adopted in slum clearance cases. Swift, J.'s, formula restricting judicial interference to cases where ' there was no material, no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made '[19] is perhaps not clear beyond doubt but certainly indicative of the same judicial restraint.

In the very recent decision, by which the Court of Appeal restored the validity of the Plymouth redevelopment scheme,[20] Greene, M.R., said : ' In making his decision, he may obviously be guided by his own views as to what is " expedient " for the purpose of dealing " satisfactorily " with extensive war damage . . . How can the Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts bona fide (as he must be assumed to do in the absence of evidence to the contrary) be called on to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts, and I can see no ground in the language of the Act, in principle or in authority, for thinking otherwise '.[20a]

It is submitted that grave legal uncertainty as well as political danger would follow from any attempt of the courts to interfere in administrative policy and discretion and to examine reasonableness as distinct from (a) excess of statutory

[18] Cf. Treves, *loc. cit.*, p. 280; Wade and Phillips, *Constitutional Law*, 3rd ed., p. 271.

[19] *Re Bowman*, [1932] 2 K.B. 634, confirmed in *Re L.C.C. Order*, 1938. [1945] 2 All E.R. 484; cf. de Smith, 10 Mod.L.Rev. 329.

[20] *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851; cf. above, p. 382.

[20a] A similar view is taken by the House of Lords in the *Stevenage Case* (*The Times*, July 25, 1947).

powers and (b) objectionable motives. Not only would such an attitude be an almost open defiance of clear parliamentary language, it would precipitate a dangerous conflict between the judiciary on the one hand and those responsible for policy on the other hand. Where is the limit to be drawn? If the courts examine reasonableness in the wider sense, could they declare invalid as ultra vires a contract by the National Coal Board for the purchase of a rest home for miners' families? Could they invalidate the purchase of administrative headquarters as being extravagant and therefore not 'calculated' or 'required' for the proper discharge of their functions? The proper machinery for control is a strict system of auditing and accounting and effective supervision by Parliament, not the haphazard and inevitably arbitrary control of law courts. Even if the different attitude taken by the Supreme Court of the United States for the last eighty years or more were legally justified, there is a fundamental difference between the British and American constitutional systems. The latter assigns a different function to the judge; it does not limit the principle of executive responsibility by a check on both, exercised by the courts as guardians of the Constitution.

The different aspects of the ultra vires problem are best illustrated in the Civil Aviation Act. The general powers clause has been quoted above (p. 245). It should make the corporation immune from judicial interference, except only in case of a *détournement de pouvoir*. For example, the purchase of land at a grossly exorbitant price, when shown to be due to personal interests of a member of the board, would be a clear case of abuse of powers.

The Minister is further empowered to 'define the powers conferred upon the corporation . . . so far as he thinks it desirable so to do for the purpose of securing that the public are properly informed as to the general nature and scope of the activities in which the corporation may engage', but it is specifically provided that such an order is not to prejudice the generality of the powers conferred upon the corporations. In other words, such an order operates as a limitation of authority, not of capacity. The board can be held to account for breach of duty, but a contract which it concludes in violation of the order is not invalidated.

There are, thirdly, statutory limitations upon the powers. The Airways Corporations have, for example, no power to manufacture air frames or aero engines. Their borrowing powers are subject to regulations by the Treasury. If a

corporation enters into a contract relating to the business of making air frames, or if it exceeds its borrowing authority, these are cases of *excés de pouvoir* and subject to the ultra vires rule.

Lastly, the Minister may, by an order, limit the powers of the public corporation, 'to such extent as he thinks desirable in the public interest, by providing that any power of the corporation specified in the order shall not be exercisable except in accordance with a general or special authority given by him'. Such an order must be laid before Parliament which can annul it within forty days. This is a case of a limitation of powers, with effect towards third parties. That is to say, a limitation of capacity, not only of authority. The problem arises however, whether a ministerial order confirmed by Parliament does not raise the order to the level of an Act of Parliament. The problem of the legal effect of the clause 'as if enacted by Parliament' is still obscure.[21] It is submitted however, that a ministerial order, even if laid before Parliament, retains the character of a delegated statutory power.

It remains to ask how the ultra vires question could arise in practice.

Ultra vires proceedings may be started either by the corporation itself, or by third parties.

The former is the normal procedure in the case of companies, the latter in the case of local authorities or other public authorities equipped with statutory powers.

Under the rules in *Foss* v. *Harbottle* [22] and in *Burland* v. *Earle*,[23] the company itself must sue to redress a wrong done to the company or to recover moneys or damages. But where the majority of the shares is controlled by those against whom relief is sought, the complaining shareholders may sue in their own name. A public corporation has no private shareholders. Its shareholder is the nation represented through Parliament which acts through the responsible Minister. Suppose that the purchase, by National Coal Board or the Electricity Authority, of extensive properties, either for investment or for the development of holiday homes, is criticised in Parliament. It may be that the Minister himself is anxious to stop extravagance, or that a change of Government leads to a change of policy. Again, a particular member of the board may have been extravagant or fraudulent in transactions entered into on behalf of the board.

[21] See Allen, *Law and Orders*, Appendix 1.
[22] (1843), 2 Hare., 461.
[23] [1902] A.C. 83.

Does the analogy of company law apply? For the reasons given above, it is submitted that it does not. Public corporations are special public authorities, not commercial companies, and the remedy of Parliament and Government must be political, administrative and disciplinary. The Minister cannot be compared to a minority shareholder.

But if public corporations are in the position of special public authorities, the remedies normally available against these should apply.

In the first place, there may be an action for damages or specific performance by a third party, arising out of an act purporting to be on behalf of the corporation. It may be in contract or in tort. In either case, it would be the right and the duty of the corporation to plead ultra vires (although the scope of the defence is probably smaller in tort than in contract, if the view put forward earlier on, n. 9, is correct). According to settled principle, the doctrine of estoppel does not apply to ultra vires cases.[24] Such situations will not arise frequently, but they are by no means impossible, especially if the new corporations should develop the desired spirit of healthy enterprise. For example, an Area Board has power to repair and maintain but not to manufacture electrical fittings. The borderline may not always be easy to determine.

In the mixed economy of the new Britain, there may be applications for injunctions, or motions for prerogative orders, by private business interests contesting what they consider an undue extension of public enterprise. It is possible, for example, that an airways corporation may wish to start a local shipping service for its passengers, as an activity, ' calculated to facilitate the discharge of its functions ', and that either a local shiping line, or shipping lines in general would apply for an injunction to stop the airways corporation. Conflicts of competence may also arise between different nationalised services. An injunction lies against a public authority, at the suit of an individual who claims special damage as the result of an ultra vires action. The Attorney-General may ask for an injunction where the public interest is concerned.[25] The delimitation of the respective competences of several public corporations, or of public and private enterprise, may well be such a public interest.

Again, mandamus lies where no other adequate remedy can

[24] Street, *Ultra Vires*, p. 400, and authorities there cited.
[25] Wade and Phillips, *loc. cit.*, p. 285.

be obtained and the claimant can show a clear right to the performance of a duty by the public authority. This is potentially the most important of the legal remedies available to the public, but its scope is far from clear. It has been refused to a sanitary authority wishing to enforce, by means of mandamus, the carrying out of vaccination by another authority [26]; on the other hand a ratepayer obtained a mandamus to compel the production of the accounts of a local authority for inspection by his agent.[27] Nice questions may arise as to the extent to which the public duties imposed upon a corporation engender private rights, but the majority of public duties imposed upon the public corporations, such as the mining and distribution of coal, or the creation of a co-ordinated and efficient transport system, must be construed as public duties, not enforceable at the wish of an individual.

The vast majority of potential conflicts are removed from the judicial forum by the width and elasticity of the powers of the corporations. This increases the importance of adequate public control, by means of ministerial supervision, parliamentary debate, public auditing and periodical check through parliamentary sub-committees.

11. LEGAL POWERS AND PRIVILEGES OF THE PUBLIC CORPORATIONS

While the public corporation has, generally, the rights and duties, powers and liabilities of a private legal person, its character as a public authority is shown in a certain number of privileges and powers. The only limited privilege is the shortening of the period of limitation in the case of actions against the public corporation from six to three years. More important are certain powers of compulsory acquisition of land and rights in land. Such powers the New Towns Act gives to the development corporations which may, with the consent of the Minister, by agreement or by a compulsory purchase order, made by the corporations and confirmed by the Minister, acquire compulsorily certain land for the purpose of development of new towns.[28]

Powers of compulsory purchase of land, in connection with the discharge of their functions, may also be given by the

[26] *R.* v. *Lewisham Union*, [1897] 1 Q.B. 498.
[27] *R.* v. *Bedwelty U.D.C., ex p. Price*, [1934] 1 K.B. 333.
[28] New Towns Act, s. 4.

Minister to an Electricity Board or to the Transport Commission, which are for this purpose put in the same position as a local authority.[29]

In the case of the airways corporations, on the other hand, it is the Minister himself, not the public corporations, who is given power to acquire land by compulsorily purchase.

The Transport Bill refers repeatedly to the acquisition by the Commission, whether by agreement or otherwise, of the whole or any part of an undertaking.[30] This seems to be a case of an agreement in which one of the parties has at most a limited freedom of contract. The Act appears to give to one party, namely the Transport Commission, the power to acquire undertakings, with the alternative for the other party to agree to the transfer of the undertaking by a contract, on terms to be agreed, or leave it to the Commission, in conjunction with the Minister, to acquire the undertaking by a unilateral action, with resort to arbitration.

Finally, reference has already been made to the power of the commercial public corporations administering nationalised industries to disclaim agreements made between undertakings taken over for either services or goods, where they consider such agreements to have been unreasonable or imprudent.[31] This is a power of a transitory character, connected with the transfer of private industry to public ownership. A permanent power of unilateral termination or variation of contract is not vested in the public corporation: it is not a Government Department.[32] Where national policies compel changes which affect existing contracts (*e.g.*, a switch-over from mass construction or purchase of locomotives to electric generators) the Ministers may give directions. Where both contracting parties are public corporations or Government Departments, corresponding directions of the different Ministers concerned can easily produce the necessary variations or cancellations. But where one party is private, agreement must be obtained. It is, of course, possible that the commercial public corporations may individually develop standard terms of contract comparable to those of Government contracts. All

[29] Section 9, Electricity Bill; s. 8, Transport Bill.
[30] Section 2 (3); s. 3 (4), Transport Bill.
[31] Section 7, Coal Industry Nationalisation Act. Section 15, Transport Bill.
[32] The Standard Conditions of Government Contracts contain a 'Break' clause vesting a unilateral power in the government authority to determine the contract subject to reasonable indemnification and limited resort to arbitration.

this is part of the wider problem of the *contrat administratif*[33] developed in Continental jurisprudence but hitherto ignored in English jurisprudence. An example of statutory novation is the power of the Minister under section 16, Electricity Bill, to provide for the alteration of the areas of the Area Electricity Boards, including the abolition of a board. In this connection he may provide for the transfer of rights, liabilities and obligations from one board to another and for the modification of agreements, severance of leases and other adjustments. In relation to third parties this means the substitution of a new party to the contract. This is, however, compatible with general principles of contract which admits the substitution of a new debtor where the performance of obligations under the contract is not of a personal character.

12. JUDICIAL MACHINERY AND ARBITRATION

1. The extent to which the ordinary courts may be concerned with matters arising out of the new Acts has already been referred to. They will, of course, be competent to deal with ordinary actions in Contract, Tort, Property and Equity. The public corporations, except for the powers and privileges already mentioned, will be in the same position as other legal persons. A far more difficult problem will arise from the application of ultra vires principles to the statutory capacity of public corporations, as this involves to some extent the character of the public corporations as public authorities.

2. Arbitration Tribunals are set up for the settlement of the numerous questions arising in connection with the transfer of assets, interests, rights and liabilities from private to public ownership.[34]

The Coal Act merely provides for a panel of arbitrators to be appointed by the Lord Chancellor. The Transport and Electricity Bills, on the other hand, provide for the setting up of Arbitration Tribunals competent to decide any matters referred to arbitration under the Act. These tribunals are Courts of Record. They consist of a legally qualified President appointed by the Lord Chancellor, a legally qualified member appointed by the Lord President of the Court of Session, and two members appointed by the Lord Chancellor, of whom one

[33] Jèze; *Contrats Administratifs*, p. 229, *et seq.*

[34] The complex provisions on compensation which will be the main preoccupation of these tribunals, have not been dealt with in this article, as they are not connected with the permanent structure of the public corporation and are mainly a matter for study by economic and financial experts.

shall be a person of experience in business and one a person of experience in finance.

These Arbitration Tribunals have power to administer oaths, summon witnesses and impose costs, in accordance with the provisions of the Arbitration Act.

On questions of law the Arbitration Tribunals may state a special case for determination by the Court of Appeal which may give leave for further appeal to the House of Lords. The Minister shall have the right to be heard in all proceedings before the tribunals, but otherwise they will make their own rules, with the approval of the Lord Chancellor.

These tribunals are thus a type of administrative court of the form least objectionable to the champions of the traditional 'rule of law'. Fact-finding and decision in the first instance—which will be final in most cases—is left to a body composed of both legal and business experts, which is not bound by the strict procedure of an ordinary law court. But the decisions on points of law will be in the hands of the higher ordinary courts.

3. An entirely different function is exercised by the Agricultural Land Tribunal to be established under the Agriculture Bill.[35] This tribunal consists of a chairman appointed by the Lord Chancellor who shall be a barrister or solicitor of not less than seven years' standing. The other two members shall be appointed from panels nominated by organisations of farmers and land owners respectively. This tribunal is to determine on the justification of a number of actions which the Minister is empowered to take under the bill, in particular the dispossession of farmers because of inefficient farming, or the giving of directions to owners of land for the provision of certain equipment.[36]

There is no provision in this case for reference of points of law to the ordinary courts. It is probably thought that the decisions will demand farming experience and general equity considerations rather than a knowledge of law.

4. Finally, reference has already been made to the curious institution of the Air Transport Advisory Council which is constituted on the pattern of an administrative tribunal, although its functions are not judicial or even quasi-judicial, but advisory.

[35] Section 70, Agriculture Bill, and 9th Schedule, ss. 13–19 thereto.
[36] Cf., ss. 15, 16, Agriculture Bill.

Some General Conclusions

1. There can be little objection to the general structure of the public corporation as it emerges from the new legislation. Its cornerstones, the appointment of the boards by the Minister, separate accounting and auditing and responsibility to Parliament through the competent Minister, represent sound principles. Nor is it a test for or against the success of the great experiment whether the public corporations will show a profit in the immediate future. The purpose of the establishment of public corporations is that there shall be a check on the efficiency and economy of management, not that there shall be an immediate profit. It is the very purpose of public control to enable a long term view to be taken in the national interest on the development of a particular industry. Nor should it be overlooked that private industry has often enough disguised its own loss by the much more dubious and objectionable form of State support without control, through tariffs, quotas or subsidies.

2. Criticism must be mainly directed against certain provisions which are incompatible with the avowed general objectives of the public corporation :—

(a) Gravest of all is the power of the Minister, referred to above, of withholding the disclosure of directions given by him to a public corporation from Parliament, where he considers that it is against the national interest to do so.[37] This is a dangerous violation of the principle of constitutional liability. As distinct from the American practice, the British public corporations are not directly responsible to Parliament; they account to the Minister and he accounts to Parliament. This is in accordance with the principles of the British Constitution. It is all the more vital that the Minister, who is supposed to be the trustee and servant of Parliament, should be fully accountable. The cases where the disclosure of the directions to a public corporation would be against the national interest should be rare indeed. Where they do exist, it should not be beyond the ingenuity of Parliamentary procedure to provide for secrecy.

(b) A matter which is more open to doubt is the elimination of the audit by the Comptroller and Auditor-General in the case of the accounts of the commercial public corporations (as distinct from the social service public corporations which are a

[37] The debate on the Transport Bill has now resulted in the substitution of 'national security' for 'national interest'. This means considerably less latitude for the Minister.

charge on the departmental budget and financed by advances or other payments out of the Consolidated Fund). It can be argued with some force that commercial public corporations shall be subject to the same auditing duties and standards as private companies but not to an additional audit by a public authority. It is, moreover, true, as argued by the Minister of Fuel and Power in the debate on the Coal Bill, that the Public Accounts Committee can always refer a particular transaction to the Comptroller and Auditor-General. There are stronger reasons, however, in favour of general auditing by the Comptroller and Auditor-General. The public corporations are distinct from private companies, being accountable to Parliament and subject to ministerial directions. Their shareholder is the nation, represented through Parliament and the Government. Submission of their accounts to the Comptroller and Auditor-General would presuppose a strengthening of the latter's department by a section for public commercial auditing staffed with persons of adequate commercial as well as constitutional training. The development of a commercial public auditing service might be of beneficial influence in setting better and stricter standards in such matters as the expenses accounts of companies, today the main form of evading income tax, for both individuals and corporations. Moreover the strengthening of public auditing would reduce the case for judicial investigation of the reasonableness of contracts and other transactions entered into by the public corporations (cf. above, p. 379 *et seq.*).

(c) There is an obvious need for the adaptation of parliamentary control to the new tasks. Effective control can hardly be exercised adequately through the Public Accounts Committee. It will be necessary for special Parliamentary Committees to be formed either for the public corporations as a whole, or for the several industries put under public control.

(d) Connected with this is the need for co-ordination between the different ministers concerned with the public corporations. This is primarily a matter of policy but it has its legal implications. It is obvious that changing policy requirements will compel occasional adjustments of private purchases and other contracts in the relations between different public corporations as well as between any one of them and third parties. Pending the development of clear legal principles, this will be done by voluntary modification, or by the

use of break clauses in the contracts. Close policy co-ordination between the ministers and the public corporations will lessen the danger of disturbance.

3. A more fundamental issue which can only be touched upon in this context, is the now desperate need for the establishment of a clearer system of administrative law. For years almost every constitutional writer of repute has acknowledged the faultiness of Dicey views on administrative law.[38] The establishment of a series of new public corporations affecting an extremely important sector of economic and social life has produced a considerable number of new administrative tribunals, in addition to the hundreds already scattered over the various fields of public life. These tribunals will adjudicate on questions vital to the individual and to the community, such as the principles of compensation, the conditions determining dispossession in the public interest, etc. In addition, new problems will arise, partly for the ordinary courts, partly for administrative tribunals, in regard to administrative discretion and interference with individual rights.

Apart from occasional decisions of the ordinary courts, on applications for prerogative orders and on points of law stated by certain arbitration tribunals, the principles will be lost to the community and to the law. There will be no co-ordination, no coherent system. Yet all these questions will be of even greater significance in this country, with its vast network of socialised industries and social services, than in the Continental systems which have long developed a coherent body of administrative tribunals and principles of administrative law.

4. Another vital question must also be the subject of a separate study. The vast increase in public services of different kinds will necessitate a fundamental readjustment of legal training. At present the English lawyer is practically unprepared for the understanding and interpretation of the modern social and economic statute. Except for constitutional law in the narrow sense he is untrained in the vast and complex problems of public law which consist of a mixture of common law and public law principles. The gap between legal training and legal reality will become increasingly serious unless a fundamental reorientation of legal education takes place. At

[38] Cf., Morgan in Introduction to Robinson's *Public Authorities and Legal Liability*; Jennings' *Law and the Constitution*; Allen's *Law in the Making*; Wade, Introduction to Dicey, *Law of the Constitution*.

present, some of the University law schools timidly admit Administrative Law as an optional subject. It is still ignored in the legal training of a barrister or a solicitor. Nor is it simply a matter of admitting an additional subject. The teaching of many vital and traditional subjects, such as Property, Tort, and Contract, should be modernised in the light of such matters as Government Contracts, Common Law duties of public authorities and public law restrictions on the right of property. Unless such readjustment takes place, the gulf between social reality and the legal profession may become calamitous.

W. Friedmann.

'My Lords, nothing could be simpler than the facts in this appeal; nothing more far-reaching than the discussion of fundamental principles to which it has given rise.' With these significant words Lord Macmillan began his judgment in the appeal of *Read* v. *J. Lyons & Co., Ltd.*, [1947] A. C. 156, at 170, a decision which must rank forthwith as a leading authority by reason of the extensive limitations it imposes on liability under the rule in *Rylands* v. *Fletcher*. Further emphasis was given to the privileged position in English law of rights over land, and Lords Simon and Porter, at pp. 167 and 178 respectively, cited with approval the dictum of Lindley, L.J., apropos of *Rylands* v. *Fletcher* from *Green* v. *Chelsea Waterworks Co.*, 70 L.T. at 549 : ' That decision is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision '.

The simple facts of *Read* v. *Lyons* were that the respondents occupied and operated the Elstow ordnance factory as agents of the Ministry of Supply, its owners. The appellant was an inspector, employed by the Ministry. In discharge of her duties, she was present in the shell-filling shop when an explosion occurred causing her personal injuries for which the damages were assessed at £575. No negligence was averred or proved. Cassels, J., held such ultra-hazardous activity imposed a strict liability and gave judgment for the plaintiff. The Court of Appeal reversed this on the ground that no cause of action was disclosed, *Rylands* v. *Fletcher* being inapplicable in the absence of an escape from the defendant's land.

In the House of Lords, liability was measured by the duty owed by an occupier to an invitee. At p. 185 Lord Uthwatt epitomises the occupier's liability to the different classes of entrant. ' Put broadly, the trespasser can complain of uncivilised conduct, and if a child, of the fascination offered by the occupier's land to which, with resulting damage to himself, he has not unnaturally succumbed. The demands of polite society are thereby satisfied. The bare licensee is entitled to assume that the gift to him possesses its face value as the occupier sees it, but cannot otherwise call for a review of its

character. Courtesy is not to be repaid by ingratitude, and to the licensee with an interest commonly called an invitee (and the appellant comes within this class of invitees) a duty of care is owed, the reason being that the invitee may reasonably expect his interests to be considered.' As Viscount Simon says at p. 165: 'The fact that the work that was being carried on was of a kind which requires special care is a reason why the standard of care should be high, but there is no reason for saying that the occupier is liable for resulting damage to an invitee without any proof of negligence at all'. This view of an occupier's liability to an invitee had the authority of Lord Herschell in *Membery* v. *G.W.R. Co.* (1889), 14 App.Cas. at p. 191 (cited by Lord Uthwatt at p. 187), and of Lewis, J., in *Howard* v. *Houlder Lines, Ltd.*, [1936] 2 All E.R. 781.

As indicated above, it is in its negative implications that the primary importance of *Read* v. *Lyons* is to be found. It vindicates the view in Salmond, *Torts*, p. 566, that liability for dangerous chattels involves the presence of the element of negligence somewhere. Such classification, as pointed out by Atkinson, J., in *Burfitt* v. *Kille*, [1939] 2 K.B. 743 at p. 747, may dispense with the onus of proving a duty of care but not with proof of its breach. Thus the ghost of '*Rylands* v. *Fletcher* chattels' is laid *per* Lord Macmillan at p. 172: 'I am unable to accept the proposition that in law the manufacture of high explosive shells is a dangerous operation which imposes on the manufacturer an absolute liability for any personal injuries which may be sustained in consequence of his operations. Strict liability, if you will, is imposed on him in the sense that he must exercise a high degree of care, but that is all. The sound view, in my opinion, is that the law in all cases exacts a degree of care commensurate with the risk created'; *per* Lord Simonds at p. 182: 'I would say that his obligation to those lawfully on his premises is to be ultra cautious in carrying on his ultra-hazardous activity, but that it will still be the task of the injured person to show that the defendant owed to him a duty of care and did not fulfil it'; and *per* Lord Uthwatt at p. 186 'I do not regard *Rylands* v. *Fletcher* as laying down any principle other than a principle applicable between occupiers in respect of their lands or as reflecting an aspect of some wider principle applicable to dangerous businesses or dangerous things'. The necessity of an escape was defined by Viscount Simon at p. 166: 'Escape for the purpose of applying the proposition in *Rylands* v.

Fletcher means escape from the place which the defendant has occupation of, or control over, to a place which is outside his occupation or control '. At p. 168 he says, ' Here there is no escape of the relevant kind at all, and the appellant's action fails on that ground '.

Though distinguishing *Rylands* v. *Fletcher* from the instant case by the absence of any ' escape ', their Lordships showed a strong disposition to question the assumption that the filling of shells in an ordnance factory during a total war was a non-natural user of land. The defence of natural user was a qualification by Lord Cairns in the House of Lords on Blackburn's general formulation of the liability in the Exchequer Chamber. Intended originally to refer to such uses as the working of minerals, it was extended by dicta to other uses, *e.g.*, a domestic water system in *Rickards* v. *Lothian*, [1913] A.C. 263, and an electric lighting system in *Collingwood* v. *Home & Colonial Stores, Ltd.*, [1936] 3 All E.R. 200, on the basis that the elasticity thereby given to keep pace with modern developments more than outweighed the uncertainty thus introduced in a branch of liability without fault. Their Lordships distinguished *Rainham Chemical Works, Ltd.*, v. *Belvedere Fish Guano Co.*, [1921] 2 A.C. 465, as turning on whether the two directors, as well as the company, were ' occupiers ', the non-natural user being conceded before Scrutton, J., and only incidentally assumed in Lord Buckmaster's judgment. Though the liability of the defendant company was not seriously argued in that case, it must have depended on the user being non-natural; hence their Lordships' circumvention of the authority of the case is a significant distinguishing of precedent. Thus Viscount Simon at p. 169 : ' If the question had hereafter to be decided whether the making of munitions in a factory at the Government's request in time of war for the purpose of helping to defeat the enemy is a " non-natural " use of land, adopted by the occupier " for his own purposes ", it would not seem to me that the House would be bound by this authority to say that it was '. Again, Lord Macmillan at p. 174 : ' I have already pointed out that nothing escaped from the defendant's premises, and, were it necessary to decide the point, I should hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory upon it and conduct there the manufacture of explosives '. As Lord Porter says at p. 176 : ' I think that all the circumstances of time and place and practice of

mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances '.

Far more controversial will prove the attempt of Lords Simon, Macmillan and Simonds to restrict *Rylands* v. *Fletcher* liability further to proprietary, as opposed to personal, injuries. After remarking at p. 171 that ' the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others ', Lord Macmillan continues (p. 172) : ' Cassels, J., in his judgment, records that " it was not denied that if a person outside the premises had been injured in the explosion the defendants would have been liable without proof of negligence ". I do not agree with this view. In my opinion, persons injured by the explosion inside or outside the defendant's premises would alike require to aver and prove negligence to render the defendants liable '. Similarly, Lord Simonds says at p. 180 : ' But I would not be taken as assenting to the proposition that if, *e.g.*, the plaintiff in *Rainham's Case* had been a natural person who had suffered personal injuries the result would necessarily be the same '. It is respectfully submitted that these dicta may revive the old confusion between culpability and compensation. If all they are intended to mean is that the escape from B's land of something likely to do mischief, resulting in personal injury to the plaintiff, of itself discloses no cause of action in the absence of negligence, they are unexceptionable. If, on the other hand, they are intended to lay down that, a cause of action having been established under the rule in *Rylands* v. *Fletcher*, nuisance or cattle trespass, direct personal injury resulting is irrecoverable, so revolutionary a conclusion does not appear to accord with the modern theory which would compensate for direct personal injury resulting from the violation of a right, and appears devoid of authority. That the liability only extends to the occupier of adjoining land is historically demonstrable, but the inviolability of my close would be illusory indeed if not extending to my person, when occupying and using my land. Viscount Simon at p. 169 cites Blackburn, J.'s judgment from *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453, as referring to workmen's clothes, tools or wages, but not personal injuries. Yet the gist of that case was whether a sub-contractor not in occupation could sue, and the

natural inference from Blackburn, J.'s language would seem to be that he recognised other damage than that to land, *i.e.*, damage to chattels or loss of employment. The escape of water from a main, delaying operations as in *Cattle's Case*, would hardly suggest any personal injury, hence no significance can be attached to its omission. Lord Porter, at p. 178, cites as applications of the rule in *Rylands* v. *Fletcher* involving personal injury; Atkinson, J., in *Shiffman* v. *Order of St. John*, [1936] 1 All E.R. 557 (co-licensees in Hyde Park); Fletcher Moulton, L.J., in *Wing* v. *L.G.O. Co.*, [1909] 2 K.B. 652 (co-users of the highway), and *Miles* v. *Forest Rock Granite Co.* (1918), 34 T.L.R. 500 (user of highway). To these may be added as most authoritative the Court of Appeal decision of *Hale* v. *Jennings Bros.*, [1938] 1 All E.R. 579 (in which the plaintiff was the defendants' tenant). Similarly, though cases of personal injury on private land are comparatively rare, nuisance provides examples: *Malone* v. *Laskey*, [1907] 2 K.B. 141; *Bosworth-Smith* v. *Gwynnes* (1920), 122 L.T. 15 (loss of sleep), and numerous highway cases as *Leanse* v. *Lord Egerton*, [1943] K.B. 323, and, in the Court of Appeal, *Slater* v. *Worthington's Stores*, [1941] 1 K.B. 488, and *Dollman* v. *Hillman*, [1941] 1 All E.R. 355. The fallacy of confusing cause of action with kind of damage appears from Lord Macmillan's judgment at p. 173: 'The doctrine of *Rylands* v. *Fletcher*, as I understand it, derives from a conception of the mutual duties of adjoining or neighbouring landowners and its congeners are trespass and nuisance. If its foundation is to be found in the injunction *sic utere tuo ut alienum non laedas*, then it is manifest that it has nothing to do with personal injuries. The duty is to refrain from injuring not *alium* but *alienum*'. The original form of this injunction in the Institutes was *alterum non laedere*, and, to the translation in Broom's *Legal Maxims*, 'Enjoy your own property in such a manner as not to injure that of another person', is appended the note (*p*) at p. 289: 'Such is the literal translation of the above maxim, its true legal meaning would rather be, "So use your own property as not to injure the rights of another"'. The suggestion that I can recover for an explosion wrecking my conservatory or a horse trespassing on my rose bed, but not for an explosion blowing me out of my deck chair in my own garden, or a horse treading on my face as I sleep on my lawn, has little to commend it. The invasion of my proprietary rights may ground a cause of action, though directly resulting in

damage to my person. As Lord Wright says in *Bourhill* v. *Young*, [1943] A.C. at p. 109, 'The question of liability is anterior to the question of the measure of the consequences which go with the liability'.

Assuming that their Lordships' intention was to restrict the cause of action to adjacent occupiers, and not to limit the kind of damage recoverable, it is difficult to reconcile with their opinion the statement of Salmond, *Torts*, p. 520, that a guest or invitee upon adjoining property could sue, and on this point *Shiffman's Case* seems overruled. This particular point in *Shiffman's Case* was not argued, and Atkinson, J., had already decided in negligence. That occupiers have a sufficient interest to be made liable under *Rylands* v. *Fletcher* or nuisance was recognised in the approval accorded *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772, and *Midwood* v. *Manchester Corporation*, [1905] 2 K.B. 597, respectively, though a distinction exists as to the competence of such an occupier as plaintiff. Thus he may sue under *Rylands* v. *Fletcher* for damage due to an abnormal user (as in the *Charing Cross Case*), but not for nuisance. The principle of this distinction is clearly stated by the Court of Appeal in *Malone* v. *Laskey*, [1907] 2 K.B. 141. At p. 153 Fletcher Moulton, L.J., points out that an occupier may tolerate or authorise a nuisance gratuitously or for a consideration, a discretion incompatible with superimposed rights acquired by his licensee.

More difficult is the question whether *Rylands* v. *Fletcher* liability extends from the occupier of adjacent land to the user of the highway. Such extension would appear inconsistent with its restriction by *Read* v. *Lyons*. Lord Sumner was at pains to distinguish the licensees in the *Charing Cross Case* from co-users of the highway. At p. 780, [1914] 3 K.B., he says: 'I differ from Scrutton, J., because he clearly was disposed to think that this was a case of joint user of highways. These cables and mains were laid under the highway, but the laying and using of them are no part of the use of the highway'. Moreover, the invocation of *Rylands* v. *Fletcher* by Fletcher Moulton, L.J., in *Wing* v. *L.G.O. Co.*, and by Swinfen Eady, M.R., in *Miles* v. *Forest Rock Granite Co.* (*supra*), was in each case entirely obiter. As the highway is dedicated for the use of the public, it seems reasonable that an occupier of adjoining land should only be liable for creating a public nuisance, *i.e.* one amounting to an indictable misdemeanour,

or continuing a nuisance, *i.e.* failing to abate one of which he ought to know, or seeing that care is taken, *e.g.* by his independent contractor, and that, in the absence of some act or omission, he is exempt from ' strict liability ' as such. Therefore a fortuitous explosion on adjacent land would not be actionable by a user of a highway, though *Miles* v. *Forest Rock Granite Co.* (*supra*), decided in negligence, might also be supported in nuisance as the blasting operations were intentional.

The oft-debated question whether Blackburn's illustrations were intended as instances of other forms of liability without fault, or as applications of the general principle embodied in *Rylands* v. *Fletcher* was answered emphatically in the former sense by Viscount Simon at p. 167 : ' There are instances, no doubt, in our law in which liability for damage may be established apart from proof of negligence, but it appears to me logically unnecessary and historically incorrect to refer to all these instances as deduced from one common principle ', and by Lord Porter at p. 178 : ' Too much stress must not, in my opinion, be laid on these illustrations. They are not instances of the application of the rule of strict liability, having for the most part separate historical origins, and although they support the view that liability may exist in cases where neither negligence, nuisance nor trespass are to be found, yet it need not, as I think, necessarily be said they form a separate coherent class in which liability is created by the same elements throughout '. Many will regret the lost opportunity of removing this lack of coherence by placing strict liability on a sound juristic basis. A constructive approach, similar to Lord Atkin's classic contribution to the law of negligence in *Donoghue* v. *Stevenson*, [1932] A.C. 562, might have related the doctrine to modern social and economic needs. Apart from its narrow operation as between adjacent occupiers, strict liability has little future. This may be the judicial reaction to the constant increase in legislative interference in the regulation of individual action for the benefit of society at large. In the absence of negligence, the sphere of liability without fault is curtailed; the protection of the public being left to the criminal penalties of industrial legislation. ' Your Lordships' task in this House is to decide particular cases between litigants, and your Lordships are not called on to rationalise the law of England. That attractive, if perilous, field may be left to other hands to cultivate ' (*per* Lord Macmillan at p. 175).

T. H. Tylor.

THE STATUS OF GERMANY AND OF GERMAN INTERNEES

That an interned alien enemy is not in a position to apply for a writ of habeas corpus was not disputed in *R.* v. *Home Secretary, ex p. L.*, [1945] K.B. 7, noted in 8 Mod.L.R. 78 and 61 L.Q.R. 126. The point did not precisely arise in *Netz* v. *Chuter Ede*, [1946] 1 All E.R. 628, which was a procedure summons asking for the striking out of a statement of claim under R.S.C., Ord. 25, r. 4, as disclosing no reasonable cause of action. The statement of claim in question recited that the plaintiff was a German national, resident in the United Kingdom since 1931, interned since 1940, and in 1945 notified of his imminent compulsory repatriation. The relief sought was an injunction to restrain the Home Secretary, his servants or agents, from deporting the plaintiff. Wynn-Parry, J., held that upon the plaintiff's own pleadings, behind which the court could not go, the conclusion was inescapable that he was originally a German national, and still such at the outbreak of war and so remained. The learned judge further concluded that the acts of the defendant were Acts of State, and that it was on the basis that internment of an alien was an Act of State that it had been decided in *R.* v. *Supt. of Vine Street Police Station, ex p. Liebmann*, [1916] 1 K.B. 268, and in *R.* v. *Commandant of Knockaloe Camp, ex p. Forman*, 117 L.T. 627, that an alien enemy internee cannot apply for a habeas corpus. Accepting the proposition that the court is both entitled and bound to inquire into the question whether or not an alleged act of State is within the prerogative, Wynn-Parry, J., proceeded to ask himself whether, bearing in mind that as the pleadings stood the plaintiff had to be treated as an alien enemy, the particular act complained of by him was permitted by the prerogative. The answer was in the affirmative, because an alien enemy who is within the realm is there by licence which the Crown may at any time withdraw. Whilst permitted to remain, he may, indeed, sue a subject of the Crown to protect his property and, as was held in *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284, internment is not per se a revocation of the Crown's licence. But the power of revocation remains, and its exercise is possibly a lesser exercise of sovereign power than internment. In the light of these

various considerations, and notably of the first of them, the learned judge held that the defendant had discharged the not inconsiderable onus upon him and accordingly ordered the statement of claim to be struck out.

The point, however, arose directly in *R.* v. *Bottrill, ex p. Kuechenmeister*, [1946] 1 All E.R. 635 (C.A.); [1946] 2 All E.R. 439. For that was a case of an application for a habeas corpus at the instance of a German national who had been resident in the United Kingdom before the war, interned in 1940, sent overseas, brought back, and finally notified of his imminent deportation. The Attorney-General furnished the court with a certificate from the Foreign Secretary stating that (1) by the Declaration of Berlin the Allied Powers had assumed complete governmental control of Germany, but not so as to effect its annexation; (2) that Germany still existed as a State and German nationality as a nationality, but that the Control Commission of the Allied Powers was the sole agency of government, and that (3) no treaty of peace had been concluded nor declaration terminating the state of war made, so that His Majesty was still at war with Germany, notwithstanding that all hostilities had ceased with the Declaration of Berlin. The Divisional Court held this certificate to be one behind which it could not go, so that both Germany and the state of war must be deemed to continue to exist and the applicant to be still an alien enemy. Mr. John Foster, who was counsel for the applicant, had, however, argued in the alternative that *Liebmann's Case* was decided on the basis that alien enemy civilians could be treated as prisoners of war because during hostilities of a total character they were as dangerous to a belligerent as enemy soldiers. He submitted that this reasoning was inapplicable when hostilities had ceased, and that, therefore, the right to intern civilians lapsed upon their cessation. The court to some extent disregarded the details of this argument, and was content to hold that, whatever the reasons for the decision in *Liebmann's Case*, an alien enemy could not have a writ of habeas corpus so long as a state of war existed and he was still interned. This had, in the view of the court, been decided not only in *Liebmann's Case* but also by the Court of Appeal in *Ex p. Weber*, [1916] A.C. 421, accepted without question by the House of Lords in the latter case and followed in numerous cases down to *R.* v. *Home Secretary, ex p. L., ubi supra.*

In the Court of Appeal, counsel for the applicant submitted that the Declaration of Berlin had put an end to the war: that

a sovereign State without a sovereign government was very much like a contradiction in terms and, if theoretically capable of existence, certainly incapable of being at war: and that though the Foreign Secretary's certificate was prima facie normally binding on the courts, this was not the case here, because the Declaration of Berlin was the act of the King and conclusive that the Foreign Secretary had thereafter no power to certify the continuance of the war. But this not wholly unconvincing argument was held to be based on a fallacy: by the Constitution the King makes war and peace; if by an Act of State he says that the realm is at war, then it is so, and the certificate of the Secretary of State to that effect is conclusive for the courts; if he makes peace, then there is an end of war, but it does not come to an end until peace is made; hence, in the instant case the certificate of the Foreign Secretary was still conclusive; and, following *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797, even if such certificate were inconsistent with the Declaration of Berlin, it would still be conclusive.

Concerning the alternative argument, that although a prisoner of war may not have a habeas corpus mere enemy nationality is not of itself a disqualification therefrom and internment does not create the status of a prisoner of war, the Court of Appeal was more divided in detail. Scott, L.J., thought that the exact contrary had been decided in *Liebmann's Case*, and rightly so decided on the authority of *Ex p. Weber*. In his view, the King was not obliged to admit any alien to the realm or to allow him to stay, and so could always intern an alien enemy. An alien enemy so interned became, ipso facto, a prisoner of war, but that status was not a necessary precondition of liability to expulsion. There was no halfway house between complete executive discretion and the concession to alien enemies of all the common law rights of subjects and the statutory rights of friendly aliens, and the courts should not be tempted into finding reasons for controlling the executive by the possibilities of hardship in the individual case. The argument that aliens, friendly or enemy, resident with the licence of the Crown enjoy the right of action between subject and subject because they are within the King's protection and owe him allegiance was wholly beside the point. For to seek by habeas corpus to vindicate his freedom from control by the executive was for the alien to challenge the very right to control him which the Constitution vests in the discretion of the King. Tucker, L.J., preferred not to rely on the reason

given in *Liebmann's Case* for the entertainment of the preliminary objection—the inference from the nature of total warfare—to justify the refusal of the writ and did not regard *Ex p. Weber* as conclusive either way. In his view, supported by the consideration that in the instant proceedings no prima facie case had been made out, the real objection was not that enemy civilians are nowadays as dangerous as soldiers but that an alien enemy cannot be heard to complain as against the Crown of acts done under the prerogative. Asquith, L.J., was of opinion that internment might well be an Act of State, and that such acts need by no means always be performed abroad, though he was unconvinced by the attempt to distinguish *Liebmann's Case* from the instant one.

In *Hirsch* v. *Morrison*, [1946] 2 All E.R. 27, it was sought to have struck out, not under R.S.C., Ord. 25, r. 4, but in virtue of the inherent jurisdiction, the statement of claim in an action for relief in respect of arrest, detention and threatened deportation as alien enemies brought by the same persons who were applicants for the writ of habeas corpus in *R.* v. *Home Secretary, ex p. L., ubi supra.* In a most careful judgment, Roxburgh, J., relied upon the latter case as establishing that the plaintiffs were enemy nationals at the date of judgment therein, since when nothing had occurred to alter their status; upon *R.* v. *Bottrill, ubi supra*, as showing that the war was still continuing and that the plaintiffs were therefore alien enemies at the date of judgment in those proceedings, which was subsequent to the issue of the writ in the instant action; upon *Netz* v. *Chuter Ede, ubi supra*, as the latest of authorities to the effect that actions by alien enemies claiming relief from threatened deportation cannot succeed; and, finally, again upon *R.* v. *Bottrill* for the proposition that no complaint by such persons against arrest and detention at the instance of the Crown can be heard. Accordingly, he struck out the statement of claim.

These three decisions are indisputably of high interest and are undeniably right. But it would not seem that there is much that is new in them nor that too much should be sought to be extracted from them. Upon the different issues they involve the following comments are offered:

1. *The status of Germany.* Professor Kelsen has presented in 39 A.J.I.L. 518 an attractive argument that the State of Germany ceased to exist with the Declaration of Berlin, 'the existence of an independent government [being] an essential element of a State in the eyes of international law' (at p. 519).

He therefore sees no alternative but the impossible one that Germany has become a species of no-State's-land to the conclusion that that 'geographical expression' is now a condominium of the four Allied Powers. He thinks, however, that German nationality survives, although, assuming international recognition of the acquisition of sovereignty in spite of themselves by the Allied Powers, Germans *abroad* would be under the protection of those Powers. But it must be said that his argument appears to be to some extent influenced by what he considers desirable. For if there were still a mere belligerent occupation of Germany her denazification and the dismantling of her industries could not be lawfully undertaken. Presumably, the argument advanced on behalf of the applicant in *R.* v. *Bottrill* would, if developed, follow much the same lines as Professor Kelsen's. It is one which is evidently not acceptable to either the Foreign Office or the courts. As to the latter, it must, however, be remembered that in the three cases discussed the existence or otherwise of Germany was in issue only for a very limited purpose—that of determining whether alien enmity was still a possible condition, given that wars, like quarrels of a lesser sort, presuppose at least two parties. It was nowhere suggested—nor does Professor Kelsen suggest—that the disappearance of the enemy State, if indeed it had occurred, involved not only the end of enmity but of that form of alienage which is German nationality. Yet this would seem to be quite as logical and, liberty is taken to say, quite as unpractical and academic a deduction as that the end of Germany ends the war.

2. *The continuance of the war.* Professor Kelsen, however, will not follow Mr. Foster so far as to say even that. On the contrary, although he maintains that no treaty of peace can be concluded with the non-existent Germany, he thinks that a unilateral declaration of peace by the victors would be desirable and therefore, presumably, possible (at p. 524). Here, again, his argument seems to be somewhat coloured by his views as to what would be expedient. For he objects to a treaty because of the opprobrium in which its signature would involve any new German government. The Court of Appeal took in the matter the view that might have been expected of it: that war or peace is in English law a matter for the Crown alone to determine. Scott, L.J., observed that the rule of international law might be different, but that our law has not, in that case, made it part of itself ([1946] 2 All E.R. 434, 435–6). But, if Professor Kelsen be right, international law has no

different rule. In general, it is apprehended that the question is much complicated by the circumstance that municipal legal systems have got into the habit of assigning to the ' duration ' a purely technical connotation, having nothing to do with hostilities nor yet with international relations and relating to such diverse matters as the interpretation of leases and the expiry of statutes. It would be a bold judge who would declare that the war had come to an end on any date for any purpose, and the consequences of his so doing would be incalculable. No doubt all this is highly convenient in administrative practice, but it certainly tends to befog the meaning of the simple words ' peace ' and ' war '.

3. *The status of internees.* Presumably, the acceptance of the view that the Declaration of Berlin put an end to the war would not immediately affect the situation of prisoners of war stricto sensu—combatants taken in arms. For, although Article 75 of the Geneva Convention of 1929 indicates that their repatriation is to be undertaken as soon as possible after the conclusion of peace, it is recognised that they remain under discipline pending their actual transfer. Oppenheim's *International Law* says that where war ends without a treaty of peace, *i.e.*, subjugation, ' captivity ought to end with annexation, and it will in most cases do so ' (6th ed., vol. II. p. 306). The question as to whether there is some intermediate stage between subjugation and annexation aside, the possibility of there being a distinction between prisoners of war proper and private civilian internees next falls to be considered. The Geneva Convention deals neither with them nor with enemy civil officials made captive, but Oppenheim says of both classes : ' They are not convicts, but are taken into captivity for military reasons, and are therefore prisoners of war ' and may claim the privileges of such (op. cit., p. 300). The logic of that statement seems inescapable. Certainly the condition of a prisoner of war is normally an honourable estate. But the distinction between it and the infamia of the common criminal is somewhat obscured by the differentiation sought to be made between the ' innocent ' and the ' criminal ' internment of civilian alien enemies. The latter distinction appears to arise from the conclusion reached by the Court of Appeal in *Schaffenius* v. *Goldberg*, *ubi supra*, that internment as a mere measure of police does not constitute governmental ' molestation ' within the meaning of the celebrated phrase ' without molesting the Government or being molested by it ', used by

Treby, C.J., in *Wells* v. *Williams*, 1 Ld.Raym. 282, 283, to describe the position of such alien enemies as are accorded ordinary procedural capacity. It has the demerit of stigmatising as the less honourable the civilian enemy who is the more active in his enmity and who has, for the very reason of his greater activity, the stronger claim to be assimilated to the traditionally blameless and gallant category of prisoners of war stricto sensu. It appears, further, to be both unnecessary and incorrect. The heresy that prisoners of war are exlex, mentioned, though not exactly relied on, in the *Three Spanish Sailors* (1779), 2 W.Bl. 1324, was exploded already as early as 1797 in *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 163. Not merely innocent internees but criminal ones and prisoners of war proper have ordinary procedural capacity (*Schaffenius* v. *Goldberg*; *Liebmann's Case*). Equally, they may none of them have habeas corpus in respect of their own detention at the hands of the State. But why there is this limitation is quite another question. The explanation is surely not to be found, however, in the lack of distinction between them; for that is effect and not cause. To argue that the internee has no right to habeas corpus because he is a prisoner of war does not assist until it be known why the prisoner of war is denied that remedy.

Sir Arnold McNair has, in the course of a criticism of *Liebmann's Case*, suggested convincingly that 'the true explanation is that the Crown in making a man a prisoner of war is acting under the royal prerogative (under which it wages war), and that its act, like certain other acts as a belligerent, is not examinable by the courts; in other words, that this act by the Crown belongs to the group of acts sometimes referred to as "acts of State"' (*Legal Effects of War*, 2nd ed., pp. 56, 59–60). In that they approach this view, the reasons given in the recent decisions discussed above are preferable to the petitio principii of *Liebmann's Case*: an alien enemy at large is entitled to habeas corpus, but once he is interned he is disentitled therefrom as a prisoner of war—although the legality of his internment is the very act the validity of which he desires to challenge. But the matter has not yet become wholly clear.

Expulsion may well be, as Wynn-Parry, J., suggested in *Netz'* *Case*, a lesser exercise of 'sovereign' power than internment. But does not the attempt to assimilate the power to expel to the power to intern and to find a common basis in the prerogative for the rules regarding treatment of aliens in

time of peace and those touching their control in wartime involve the acceptance of one or other of two untenable alternatives? Must it not be said that, if the power to expel and the power to intern have a common basis in the prerogative, either the power to intern exists in time of peace also —as does the power to expel—or that prerogative in war is something different in kind from the prerogative in peace? But it is not, it is apprehended, suggested that there is any power to intern aliens in time of peace. Nor would it seem to be maintained that the Crown has any greater powers during war than during the currency of a serious 'emergency' other than war. The true situation is, surely, that the power to expel rests upon one adopted rule of international law, namely, that the alien has no absolute right to enter or reside in any State other than his own whether in war or peace; and that the power to intern is derived from a distinct rule similarly adopted, namely, that a belligerent may, but naturally only during the currency of belligerency, make enemy subjects prisoners of war. Certainly that the rule of international law adumbrated rather than the prerogative is the basis of the power of internment is forcibly suggested by the circumstance that there seems to be no power to intern neutral aliens.

Clive Parry.

THE EXCHANGE CONTROL ACT, 1947

WHATEVER the political scientist, economist or historian may think about the Exchange Control Act, 1947, it is certain that lawyers will regard its appearance on the Statute Book with mixed feelings. International lawyers will confess to a state of bewilderment, the practitioner cannot help expressing melancholic resignation, and only those few who are interested in the development of the conflict of laws will find some satisfaction in theoretical speculation.

I

The Articles of Agreement of the International Monetary Fund [1] to which effect was given by the Bretton Woods Agreements Act, 1945,[2] make it one of the principal purposes of the Fund 'to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade'.[3] In pursuance of this object the Agreement provides that, while members of the Fund 'may exercise such controls as are necessary to regulate international capital movements',[4] 'no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions'.[5]

Moreover, by clause 8 (ii) of the Financial Agreement between the United Kingdom and the United States of America of December 6, 1945,[6] the Governments of both countries agree

> that not later than one year after the effective date of this Agreement, unless in exceptional cases a later date is agreed upon after consultation, they will impose no restrictions on payments and transfers for current transactions. The obligations of this paragraph (ii) shall not apply
>
> (a) . . . .
>
> (b) to restrictions imposed in conformity with the Articles of Agreement of the International Monetary Fund, provided that the Governments of

[1] Cmd. 6546.
[2] 9 & 10 Geo. 6, c. 19.
[3] Art. I (iv).
[4] Art. VI (3).
[5] Art. VIII (2) (a); for a definition of 'current international transactions' see Art. XIX.
[6] Cmd. 6708.

> the United Kingdom and the United States will not continue to invoke the provisions of Article XIV, Section 2 of those Articles (relating to exchange restrictions during the transitional period) after this paragraph (ii) becomes effective unless in exceptional cases after consultation they agree otherwise.
>
> (c) . . . .

In these circumstances three courses were open to the British Government: it could abolish exchange control altogether; it could control capital movements only; it could make all international transactions, whether they involved capital payments or current transfers, subject to a system of control and licensing and shift the burden of distinguishing between capital payments and current transfers to the administrative level.

The uninstructed reader of the Bretton Woods Agreement must have gained the impression that it was the first or second course which its authors expected member States to adopt. But in the Memorandum on the Exchange Control Bill which the Chancellor of the Exchequer presented to Parliament [7] he ingeniously disabuses that uninstructed reader of all illusions he may have entertained. The Memorandum quotes the provisions relating to capital movements and rightly concludes that 'the right and, in some circumstances, the duty of detecting and controlling capital transfers is fully recognised'. Very surprisingly, however, the Memorandum omits all reference to Art. VIII (2) (*a*) [8] of the Bretton Woods Agreement and explains that the Agreement's emphasis 'is on a liberal administration of exchange control so that genuine current transactions *are not obstructed*'. Yet the Bretton Woods Agreement knows nothing of these words; it introduces a positive duty not to 'impose restrictions on the making of payments and transfers for current international transactions'. And the British-American Agreement of December 6, 1945, uses similar words. It is, therefore, by no means certain whether the Exchange Control Act, which embodies the third of the solutions mentioned above, is really as 'fully consistent with our obligations' as the Chancellor claims in his Memorandum. However liberally the Exchange Control Act may be administered in practice, and however far-reaching the exemptions granted by Treasury regulations may be, there

[7] Cmd. 6954.
[8] Above, note 5.

must remain a wide range of transactions which the exchange control authorities may classify as capital movements while in fact they are current transfers. The mere necessity for applying for permission and, clearly, the refusal of permission for what is in fact a current international payment are ' restrictions ' which this country has undertaken not to impose.

The Government had to make an invidious choice. In the present state of Britain's economy it was difficult, and in view of the prevailing trends of British policy it was impossible, to adopt the first of the above-mentioned solutions. The Government could not very well adopt the second of those solutions, because the task of distinguishing current transactions from capital movements would have defied the labours of any legislator.[9] The Government was driven to the conclusion that the only available machinery is a system of exchange restrictions. It remains to be seen whether the practical application of this system will be such as ' to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade '.

II

The Exchange Control Act itself does not indicate such a policy, and this is why it contains few, if any, redeeming features for the practising lawyer. It is a ' Draconian measure '[10] which ' follows the " stream-lined " pattern, that is to say, it takes powers for controlling and prohibiting far more than it could conceivably be desirable to control and prohibit in practice '.[10] It is almost useless to enumerate all the prohibitions contained in the Act. The practitioner must become firmly aware of the fact that the Act makes almost everything and anything illegal (in the absence of a licence) that has any contact, however remote it may be, with abroad. This is a deliberate statement, free from exaggeration. Its implications require to be pondered over, particularly by solicitors.

It is true, of course, that by virtue of section 31 any provision of the Act ' imposing any obligation or prohibition shall have effect subject to such exemptions as may be granted by order of the Treasury, and any such exemption may be either absolute or conditional ', and by section 36 (2) ' any order made by the Treasury under this Act[11] . . . shall be laid

[9] See *British Year Book of International Law*, 1945, 254.
[10] *The Times*, November 14, 1946, p. 5.
[11] Other than certain orders specified in the Sixth Schedule.

before both Houses of Parliament immediately after it is made'. Moreover, 'any permission, consent or authority granted by the Treasury under this Act . . . shall be published in such a way as, in the opinion of the Treasury, to give any person entitled to the benefit of it an adequate opportunity of getting to know of it, unless in their opinion publication is not necessary for that purpose' (section 37 (1) (*e*)), and the powers of giving permission, consent or authority may be delegated (section 37 (4)). It has been stated in Parliament that liberal use will be made of the powers to make exemption orders and that the permissive powers of the Treasury will frequently be delegated to the banks. The practitioner will therefore have to work with the help of a continuously growing volume containing the Act, the exemptions orders from time to time made, amended, substituted or repealed, and any general permissions or directions which may have been published. It is to be hoped that this system, however cumbersome it may be, will prove to be more satisfactory than the scheme set up by the Defence (Finance) Regulations under which it was extremely difficult to know what applications for exemption or permission were likely to succeed: the Exchange Control Authorities published so-called Notices to Banks which explained the policy; they were, it is understood, readily available in New York, but could be obtained with great difficulty only by persons in this country (other than banks); the result was that almost all matters had to be referred to the banks and through them to the Exchange Control, and that the advice given by the former or the ruling procured from the latter could hardly be checked. This situation was a particularly grave one, because it was almost invariably the monopoly of the banks to have access to the Exchange Control Authorities, *i.e.*, the Bank of England, and because it was not their practice to give reasons for the refusal of any permission. Can it be doubted that administrative convenience was carried too far? Even in Nazi Germany Rules (Richtlinien) and Circular Letters (Runderlasse), supplementing the Act, were continuously published and access to the Exchange Control Authorities was open to the public.

Such, then, is the material which will have to be consulted in future. So long as no exemption orders, general permissions, directions and so forth have been published there is not much point in going beyond the general statement made above and to amplify it by enumerating the prohibitions contained in

the Act. It may, however, be useful to draw special attention to a few provisions which were not to be found in the Defence (Finance) Regulations or are of peculiar interest for practitioners.

1. Section 29 (1) of the Act provides that ' except with the permission of the Treasury no person resident in the United Kingdom shall settle any property, otherwise than by will, so as to confer an interest in the property on a person who, at the time of the settlement, is resident outside the scheduled territories, or shall exercise, otherwise than by will, any power of appointment, whether created by will or otherwise, in favour of a person who at the time of the exercise of the power, is resident outside the scheduled territories '. This important provision is mentioned here, because it may so easily be overlooked; it applies to present and future, vested and contingent interests of all descriptions.

2. Under the Defence (Finance) Regulations the validity of a contract requiring the permission of the Treasury was often doubtful, since so much depended on the facts of each case.[12] Section 33 (1) of the Act will therefore be welcomed as a helpful clarification.

> It shall be an implied condition in any contract that where, by virtue of this Act, the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required: Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.

Some points of interpretation may be noted. The provision only applies to ' contracts '; it does not apply to a payment, transfer or conveyance. The provision applies, if neither party knows of the necessity for permission as well as if both parties know such necessity and have an innocent intention; it does not apply, if both parties have the knowledge of such necessity and have a wicked intention or if both parties genuinely believe that no permission is required, and one of them guarantees the absence of such necessity. So long as only one of the parties has a wicked intention, the rule applies. An express

12 See III (1940–1941) MOD. L. REV. 202, 203.

term in the contract would presumably override the ' implied condition ' of section 33 (1).

3. Section 41 (2) gives the Treasury power to declare that a person is to be treated as resident or not resident in such territories as may be specified. The Act does not seem to explain the effect of such declaration. It cannot be assumed that it would be binding upon courts.

4. It was a curious feature of the Defence (Finance) Regulations that no provision was made regulating the procedure in connection with the collection of debts due to non-residents. It is believed that in many cases non-resident plaintiffs obtained and enforced judgments for debts the payment of which required permission.[13] The Fourth Schedule to the Exchange Control Act contains elaborate provisions dealing with this point. It is now enacted that ' it shall be implied in any judgment or order of any court in the United Kingdom and in any award given under the law of any part of the United Kingdom that any sum required to be paid by the judgment, order or award . . . to which the said provisions apply shall not be paid except with the permission of the Treasury '. Moreover, rules of court may be made to secure that, in the absence of permission, sums due or recovered under any judgment may be paid into court. But a debt shall be allowed to be a good petitioning creditor's debt and shall be admitted to proof in any bankruptcy, winding-up of any company or in the administration of the estate of a deceased person.

The position of a solicitor who, without instituting proceedings, recovers a debt due to a non-resident is a difficult one. According to section 5, the debtor may not ' make any payment to or for the credit of a person resident outside the scheduled territories ', and even if he pays to the solicitor, the latter may not place the sum to the credit of his non-resident client. It would seem, therefore, that, notwithstanding the inevitable delay, the solicitor should in the first instance obtain the directions of the Exchange Control Authorities. If these provide for payment to the credit of a blocked account, then clause 6 of the Third Schedule would apply: the debtor would be under a duty to the creditor to cause the debt to be paid or credited to the blocked account, ' and the crediting of any sum to a blocked account in pursuance of a direction of the Treasury shall, to the extent of the sum credited, be a good discharge to the person from whom the sum is due '.

[13] V (1943–1944) Mod. L. Rev.

5. Where a solicitor receives instructions to form a company for non-resident clients, he will do well to remember that he cannot follow the usual practice of having the memorandum of association subscribed by two of his clerks. By section 8 (2) the subscription by a nominee for a non-resident is, in the absence of permission, invalid in so far as the nominee's membership is concerned, though not in so far as the incorporation of the company itself is concerned.

6. The Defence (Finance) Regulations provided that the resident owner of many types of foreign securities had to register them with the Exchange Control Authorities; in many cases he was under a duty to sell the securities to the Bank of England. The Act seems to dispense with these duties and to replace them by complicated sections the short effect of which is that such securities are to be deposited with an authorised depositary (sections 15 and 16).

7. Where a resident fails to comply with his duty of selling specified currency, *e.g.*, dollars, to an authorised dealer, the Treasury may make a vesting order and so acquire the dollars against payment of the market price (section 2 (5)). If, in breach of his duties, the owner purchases American securities with his dollars, the Treasury may direct him to sell the securities and may specify 'the manner in which, the persons to whom and the terms on which the property is to be sold' (section 26).

These few observations are admittedly haphazard and insufficient to explain an Act comprising forty-four long sections and six schedules. Nothing in the nature of a commentary was intended. Some characteristic points were to be indicated for the very limited purpose of conveying a warning to those concerned with foreign interests.

III

From the point of view of the conflict of laws, the Exchange Control Act itself contains little that would require special emphasis. Most provisions of the Act apply to (a) acts done in the United Kingdom by any person, whether resident here or not, and (b) acts done outside the United Kingdom by residents. The usual formula is: 'no person . . . shall in the United Kingdom and no person resident in the United Kingdom shall outside the United Kingdom . . .'. The principle is being underlined by section 42 (5), according to which 'the obligations and prohibitions imposed by this Act shall,

subject to the express limitations contained therein, apply to all persons, notwithstanding that they are not in the United Kingdom and are not British subjects '.

The policy underlying the Act raises much more difficult questions. It has now become very doubtful whether the consequences of exchange restrictions applicable in a foreign country can ever be said to be irreconcilable with the English *ordre public*; the primacy of the policies of a planned economy which England at present proclaims and to which the Exchange Control Act gives forcible expression, may even be said positively to demand recognition of the effects of a foreign country's exchange restrictions. This may be particularly so in relation to countries which are members of the International Monetary Fund. In this connection it is necessary to draw attention to Art. VIII (2) (*b*) of the Bretton Woods Agreement which was incorporated into the law of England by section 3 of the Bretton Woods Agreement Order, 1946 [14]:

> Exchange contracts which involve the currency of any member and which are contrary to the Exchange Control Regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.

The interpretation of this article gives rise to many problems. The term ' exchange contracts ' is by no means free from ambiguity, but probably means a contract by which one of the parties promises to give consideration in the form of funds denominated in the currency of the country, the regulations of which prohibit the transaction: if by a contract made in England A, an American, promises to pay to B, a Swiss, French francs in France and the contract is contrary to French law, it is unenforceable here, though it would probably be enforceable if, contrary to French but not to Belgian law, Belgian francs were promised to be paid. In other words, the provision substitutes the control of the *lex monetae* for that of the proper law of the contract. The principal difficulty, however, arises from the words ' maintained or imposed consistently with this Agreement '. Are the English Exchange Control Regulations imposed in conformity with the Bretton Woods Agreement? As has been shown, an affirmative answer cannot be predicted with certainty. And how is an English judge to decide, *e.g.*, whether French regulations are consistent with the Agreement? He would require the most detailed

[14] S.R. & O., 1946, No. 36.

knowledge not only of the terms of the law but also of its administration in practice on which so much depends. And would it be fatal if in any particular respect, however insignificant, the regulations were found to violate the Agreement? These questions are so formidable that the use of the term ' unenforceable ' becomes a matter of minor consequence; when construing what in effect is a provision of an international treaty a judge should not have regard to technical rules of English law.[15]

F. A. Mann.

[15] Concluded on May 15, 1947.

REPORTS OF COMMITTEES

PARLIAMENTARY PRIVILEGE: THE CASE OF MR. W. J. BROWN

THE validity of an agreement restricting a Member's freedom of action in Parliament has never before been submitted to the judgment of the Committee of Privileges. The nearest precedent to the case of Mr. W. J. Brown, the Member for Rugby, is the case of Alderman Robinson (H. C. 85, 1943–44, p. 5), which is not very similar.

Mr. Brown was the salaried Parliamentary General Secretary of the Civil Service Clerical Association, a trade union within the meaning of the Trade Union Act, 1913. There was a written contract between Mr. Brown and the Association, which included provisions that Mr. Brown should ' be entitled to engage in his political activities with complete freedom ', that he should ' deal with all questions arising in the work of the Association which requires parliamentary or political action ', but that nothing therein contained should entitle him ' in his political and parliamentary activities to purport to represent the political views of the Association (if any) ', and that he should ' only represent the Association in so far as Civil Service questions are concerned '. Mr. Brown was entitled to terminate the agreement by six months' notice, but there was no corresponding power on the part of the Association. His expressions of his political opinions became embarrassing to the Association, and for that reason the Executive Committee desired to terminate the agreement. They attempted by correspondence and meetings to agree with Mr. Brown the terms on which his official connection with the Association might be brought to an end without financial loss to himself. Mr. Brown in fact provisionally agreed financial terms which he said were not unreasonable, but he insisted that the question of the termination of the agreement should be submitted to the Annual Conference. At this point complaint was made to the Committee of Privileges that the conduct of the Executive Committee of the Association was calculated improperly to influence Mr. Brown in the exercise of his parliamentary duties and constituted a breach of privilege.

The Committee of Privileges (1947, H. C. Pap. 118) formulated the following description of the nature of the privilege

involved in the present case:—' It is a breach of privilege to take or threaten action which is not merely calculated to affect the Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward '. The Committee continue: ' The relationship between a Member and an outside body with which he is in contractual relationship and from which he receives financial payments is . . . one of great difficulty and delicacy '. It would certainly be improper, the Committee state, for a Member to enter into any arrangement fettering his complete independence as a Member of Parliament by undertaking to press some particular point of view on behalf of an outside interest, whether for reward or not. Equally it might be a breach of privilege for an outside body to use the fact of an agreement or the receipt of payment as a means of exerting pressure on a Member to follow a particular course of conduct as a Member. It would also be clearly improper to attempt to punish a Member pecuniarily because of his activities as a Member. It has long been recognised, however, that there are Members who receive financial assistance from associations of constituents or other outside bodies; and so long as no attempt is made to assert or exercise control over a Member's freedom, the making of such payments does not of itself involve a breach of privilege. On the other hand, such outside body must in general be entitled to terminate that relationship lawfully when it considers it necessary for the protection of its interests to do so. It may often be difficult to reconcile these principles, and the line between them may be a fine one. The Committee of Privileges concludes that ' the Executive Committee were entitled to bring the question of the termination of the agreement before the Annual Conference of the Association, that they had in effect been invited by Mr. Brown so to do, and that their action in proposing so to do was not calculated to, and did not in fact, affect Mr. Brown in the discharge of his parliamentary duties '. The Committee did not think it necessary for the due execution of the power of Parliament that the Association should be precluded from pursuing the proposed course, and it therefore recommended that no further action should be taken by the House. They described the language of the agreement as unfortunate in so far as it suggested that Mr. Brown was to represent the Association in Civil Service matters involving parliamentary action, but they did not consider that he was

in fact fettered in his complete freedom of action in regard to such matters: nor did they think that the Executive Committee sought or intended to control or fetter his freedom in regard to wider political issues.

This report was drafted by the Attorney-General, and carried in the Committee of Privileges by a vote on party lines. The draft report proposed by Mr. Clement Davies, which had the support of the non-Labour members of the Committee, considered that improper pressure *was* brought to bear on Mr. Brown in respect of his speeches and votes in Parliament; though it recommended that, as there was no exact precedent, no action should be taken in the circumstances against the Association's officers.

The matter was debated in the House of Commons on the motion introduced by Mr. Arthur Greenwood, the Chairman of the Committee of Privileges, in the following form:—'That this House agrees with the Report of the Committee of Privileges, and in particular declares that it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof'. The second part of this motion, from the words 'and in particular declares . . .' to the end, was an expanded version of part of Mr. Clement Davies' minority draft report, and was no doubt tacked on in a laudable endeavour to secure unanimity in the House. This the motion unfortunately failed to do. Mr. Brown himself was the first to point out the confusion caused by the twofold nature of the motion, as Members might well agree with the latter part while disapproving of the report. Mr. Pickthorn, Burgess for Cambridge University, and Mr. Henry Strauss, Member for the Combined English Universities, moved an amendment to disagree with the report, but agreeing to the remainder of the motion; firstly, because they thought on the facts that improper pressure had been exercised by the Association, and secondly, because they denied that the latter part of the motion was consistent with, or involved in, the report.

Mr. Pickthorn analysed the matter into four questions, not

one of which, he contended, was clearly, plainly and rightly answered in the report, *viz* :—(i) Is it a breach of privilege by a Member to enter into any agreement, explicit or implicit, to limit the Member's parliamentary action? (ii) Is it a breach of privilege on the part of the other party, whether trade union or limited liability company, etc., by which the agreement may have been made? (iii) If any such agreement is a breach of privilege, then is not *any* pressure brought, even within the limits of the agreement, itself a breach of privilege? (iv) If such agreement is not a breach of privilege, or not so that it must be treated as void or non-existent, then is any attempt to put more pressure than the agreement purports to allow a breach of privilege? Mr. Pickthorn also criticised that part of the Committee's conclusions which says that the test of the nature and extent of any particular parliamentary privilege is whether the right claimed is one which is absolutely necessary for the due execution of the powers of Parliament. He suggested that the matter should be put in the converse form, *viz.*, privileges are something absolutely necessary for the due execution of the powers of Parliament, or, rather, of the functions of the House.

Mr. Herbert Morrison implicitly gave his opinion on the question emphasised by Mr. Strauss, namely, whether Mr. Brown's agreement in itself was objectionable. By the agreement, Mr. Morrison said, Mr. Brown had signed away his complete freedom of action on Civil Service matters. 'If, hereafter', he went on, 'people make arrangements of this sort . . . I think hon. Members and organisations concerned should be very careful and would do well to reflect upon them. If this agreement continues after tonight, I should have thought the hon. Member for Rugby and the Association would think twice about it. I should have thought it would be a matter for consideration whether a prima facie case would not arise for consideration by the Committee of Privileges.' As regards trade unions, Mr. Morrison said that, as far as he knew from his wide experience, there was no other agreement of this kind. 'In fact', he added, 'I do not know of any agreement which affected the parliamentary action of trade union Members of the House.' If he found a trade union affiliated to the Labour Party which had an agreement with its Members of Parliament similar to the one in this case, he would advise the trade union and the Member to get out of it as quickly as they could.

The amendment was defeated and Mr. Greenwood's motion

carried. Although the Whips were off, the division in the House was also on party lines, with the Independent Members mentioned voting against the resolution.

It is a recognised fact that many Members receive payment, whether as salary or otherwise, from outside bodies, and this is not undesirable in so far as public policy does not require Members of Parliament to be cut off from all contact with other occupations and professions. Such payments would relate to the work they do outside Parliament, but in most cases we may suppose that a Member's interests largely coincide with those of the outside body which pays them. Apart from the possibility of secret undertakings, it might be well-nigh impossible in some cases to determine whether or not there was an implied understanding that the Member should represent the views of the outside organisation in matters with which that organisation is concerned. No doubt some of the opposition Members found it hard to believe the position with regard to Members sponsored by trade unions. The main safeguard must lie in the good sense and integrity of Members, and the frankness with which they disclose the fact that they have a personal interest in a matter under discussion in the House. On the other hand, it would be unjust and absurd if a Member could take advantage of his position, so long as he was a Member, to disable an outside body from terminating an agreement in proper circumstances.

O. Hood Phillips.

NOTES OF CASES

VICARIOUS LIABILITY OF HOSPITAL AUTHORITIES

In *Collins* v. *Herts C.C.*, [1947] 1 All E.R. 633, the plaintiff's husband had died in a county council hospital as a result of a lethal dose of cocaine injected by an operating surgeon, Mr. H., in the belief that it was a proper anæsthetic dose of procaine. The mixture was ordered by Mr. H. in a telephone conversation with a resident house surgeon, Miss K., who misheard the instructions and told the pharmacist to dispense the lethal dose. The pharmacist did so without further inquiry or authority, and Mr. H. administered the injection without checking the mixture.

The plaintiff claimed damages against the county council, alleging negligence in the conduct of their hospital, and the statement of claim also alleged that the county council was vicariously responsible for negligence on the part of Mr. H. and Miss K. The plaintiff further claimed damages against Mr. H. on the ground of his failure to exercise reasonable care. At the trial the plaintiff sought to amend her statement of claim by alleging that the county council was also responsible for the negligence of the pharmacist, although the period of one year applicable to actions against public authorities, under section 21 of the Limitation Act, 1939, had expired.

Hilbery, J., found that the county council had permitted a dangerous and negligent system to be in operation and that Mr. H., Miss K. and the pharmacist were all guilty of negligence. On these findings at least three interesting questions of law fell to be decided.

1. *Vicarious Liability for Various Classes of Officers.*

In *Gold* v. *Essex C.C.*, [1942] 2 K.B. 293, the Court of Appeal held that a hospital authority was liable for the negligence of a competent radiographer who was a whole-time employee, and, *obiter*, that it was not liable for the negligence of a visiting surgeon. In the present case the position of Mr. H. and Miss K. was such that they fell rather nearer the borderline than the visiting surgeon and the radiographer in *Gold's Case*.

Mr. H. had signed a form showing that he was a temporary

part-time employee of the county council, undertaking to attend at the hospital each week on Tuesday for three hours, and on Friday for four hours, and to be on call on certain other days, at a basic salary of £500 per annum. Miss K. had been employed by means of a similar appointment form as a whole-time junior house surgeon; she was a student in her last year, had passed her examinations in pharmacology, but was not a qualified medical practitioner.

Hilbery, J., considered that, as a result of the decision in *Gold* v. *Essex C.C.*, the vicarious liability of a hospital authority no longer depended on whether the officer in question performed his duty under a contract for services or a contract of service,[1] but that the test was whether the officer was employed to perform some of the obligations of providing nursing, accommodation and treatment which the authority owed to its patients. If so, the fact that these obligations were performed by a professional person did not divest the authority of its responsibility on the principle *qui facit per alienum facit per se.*

On this basis the county council was held liable for Miss K.'s negligence because one of the amenities offered by the hospital to its patients was the presence at all times of a resident house surgeon.

In distinguishing the position of Mr. H. from Miss K., the learned judge applied another test, namely, the extent to which the authority was able to direct what Mr. H. did and how he did it. Deciding on the facts of the case that the authority could so direct Miss K. but not Mr. H., he held that there was no vicarious liability for the negligence of Mr. H. It is difficult to see how this test differs from the old one of contract for services or contract of service.

2. *The Nature of the Vicarious Liability.*

The English Courts are never anxious to discuss the basis of the master's liability in English law for the acts of his servant. Is the liability truly vicarious, or does it depend on the master's personal negligence in selecting and supervising the servant? The present case throws some light on the problem when we come to the plaintiff's application to amend by alleging that the county council was responsible for the negligence of the pharmacist. The county council resisted the application, arguing that it was an attempt to rely on a new cause of action which was statute-barred. The learned judge did not accept

[1] See *Hillyer* v. *St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

this view, but allowed the amendment on the ground that the allegation in respect of the pharmacist was merely a part of the particulars of the claim for negligence against the county council, as were the allegations relating to Mr. H. and Miss K. It follows from this that the responsibility of the hospital authority for the acts of officers in any of the various categories in question must be a liability for the authority's personal negligence and is not truly vicarious.

3. *Apportionment of Damages between Joint Tortfeasors.*

Mr. H., as the county council's co-defendant, was also found liable for negligence, and the next point to be considered was a claim against him by the county council for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935. By section 6 (2) the contribution recoverable from any person is such as ' may be found by the Court to be just and equitable, having regard to the extent of that person's responsibility for damage means the extent to which he is liability must be shared equally between the two defendants, purporting to follow the principle which he had laid down in *Smith* v. *Bray* (1939), 56 T.L.R. 200, that the damages should be apportioned not according to the relative negligence or culpability of the two tortfeasors, but according to the relative effect of their acts in causing the damage.

It is submitted that this interpretation of the subsection is both strained and impracticable. The extent of a person's responsibility for damage means the extent to which he is answerable for the damage, and a person does not answer for damage in a court of law except in so far as the damage is the consequence of some culpable conduct on his part. This would seem to be the proper interpretation of ' responsibility ', particularly in the context of a negligence action. The tortfeasor is found liable to the plaintiff in the first place on the basis of culpability, and there is no reason why this basis should be abandoned when the court turns to contribution.[2]

If the Legislature had wished to provide for apportionment on the principle adopted by Hilbery, J., it would surely have used some more neutral phrase such as ' the extent to which the person *caused* the damage '. It is suggested, however, that if such a phrase had been used its application would have

[2] If authority be needed for the proposition that a person is not liable for contribution unless he *is* a tortfeasor, it can be found in *Johnson* v. *Cartledge*, [1939] 3 K.B. 654.

caused grave difficulties. Indeed in the present case Hilbery, J., did not follow his own principle; the relative effect of the surgeon's act and omission (for it is clear from the judgment that omissions must be taken into account) in causing the damage was greater than anyone else's, because he failed to check the dose and actually applied the anæsthetic, yet he was only found liable to contribute equally with the hospital authority. It might be argued, in fact, that the damage on this limited theory of causation was solely the effect of the surgeon's act in applying the anæsthetic, which would reduce the principle of apportionment to absurdity.

The difficulty is to develop any logical theory of causation which relies on the effect of acts to the exclusion of their legal content. Professor Goodhart [3] has demonstrated the fallacy of contemplating acts of negligence in the abstract divorced from their consequences. The present decision illustrates the converse, the difficulty of tracing the consequences of an act without reference to its negligence. This becomes more apparent if we consider a case where the tortfeasor's initial liability is based not on an act but on an omission. If a railwayman omits to close a level crossing and an accident occurs it is impossible to trace any causal connection whatever between his omission and the damage, except by referring to what *he ought to have done*. And when one refers to what he ought to have done one is at once introducing culpability into the test.[4]

In *Croston* v. *Vaughan*, [1938] 1 K.B. 540, the Court of Appeal dismissed an appeal from a decision of Porter, J., awarding under the Act two-thirds of the liability against the driver of one car who was negligent in pulling up violently and not giving a hand signal, and one-third against the driver of another car who tried to overtake instead of braking. The issue now under review was not specifically discussed, but the whole language of the Lords Justice is against the limited theory of causation. 'It is impossible', says Greer, L.J., in concluding his judgment, 'to disturb the decision of the learned judge on the question of the proportions of the blame'.

[3] Camb. Legal Essays, 101.

[4] In *Ripon* v. *Port of London Authority*, [1940] 1 All E.R. at p. 648, the two defendants were both liable for breach of statutory duty to maintain a stairway in a dock. Tucker, J., after saying, 'It may appear curious to decide that the responsibility of one person who has committed a breach of a statutory duty . . . is in any way different from that of another person who has committed a very similar breach', awarded that three-quarters of the liability should be borne by the Port of London Authority on the ground that they were the occupiers of the dock in substance, while the other defendants were merely notional occupiers for a limited purpose.

Dissenting on the ground that failure to give a hand signal was not negligent, Slesser, L.J., would have been guided by the analogy of the Maritime Conventions Act, 1911, s. 1 (1) (*a*), which provides, ' if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally '. Scott, L.J., agrees that the appeal be dismissed, ' the proportions fixed by the learned judge for apportioning the blame between the two defendants being affirmed '.

A similar question arises under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), of which provides for the reduction of damages ' to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage '. Dr. Glanville Williams, in his paper [5] on the 1945 Act, assumes that the effect of this provision is the same as that of the Tortfeasors Act with regard to the principle of apportionment and regrets the decision in *Smith* v. *Bray*. In *Jay* v. *Veevers*, [1946] 1 All E.R. 646, however, Lynskey, J., operated the 1945 Act on the basis of culpability without reference to *Smith* v. *Bray*.

J. P. Lawton.

LEGAL EVASION OF TAXATION AND MENS REA

In an earlier note, at 6 Mod.L.Rev. 243, the writer traced the change, in recent years, in the attitude of the courts towards ' legal evasion ' of tax from the view that such evasion is not in itself morally censurable to the view that it was essentially anti-social and the negation of good citizenship. Two recent decisions of the Court of Appeal have emphasised the trend referred to and also made clear two important principles involved in the application of the statutory provisions aimed at legal evasion. In the first place it is immaterial that the rigorous, and literal, operation of these provisions may produce results that appear to be capricious or to involve undue hardship and, secondly, the possession of *mens rea*, or even a guilty knowledge of the schemes in question, is not an essential concomitant of the operation of these provisions. The cases in question—*Congreve & Congreve* v. *Inland Revenue Commissioners*, [1947] 1 All E.R. 168 and *Holt and another* v. *Inland Revenue Commissioners*, [1947] 1 All E.R. 148—were, of course, concerned to a great extent with the involved

[5] Mod.L.Rev. July, 1946, at p. 131.

technicalities of the relevant sections of the Finance Acts but they will be discussed here only in their broader aspects.

Congreve's Case was concerned with the effect of section 18 Finance Act, 1936 and section 28 Finance Act, 1938 which, very broadly, are aimed at the avoidance of taxation by individuals resident in this country by means of transfers of assets abroad whereby, as a result thereof or in conjunction with associated operations, income becomes payable to persons resident abroad but is able to be enjoyed, either *in presenti* or *in futuro*, by such individuals. On the technical issues it was held that it was sufficient to be within the section if the transfer is *procured* by the taxpayer though not actually executed by him while the material date, so far as the residence of the transferee is concerned, is the date the income becomes payable to him and not the date the transfer is executed. The main point of principle relied on by the appellant was, however, that the literal interpretation of these sections could produce results so capricious and indeed fantastic, that an entirely disproportionate penalty might be inflicted on the taxpayer; this was said with reference to the attribution to the taxpayer of the *whole* of the income of the transferee and not merely of such part as arose from the assets transferred. The Court of Appeal rejected this argument, founding itself upon the strong words of Lord Greene, M.R., in *Howard de Walden* v. *Inland Revenue Commissioners* (1942), 25 Tax Cas. 121, 133: 'It is illegitimate to force upon such language (of the sections) a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust . . . the section is a penal one and its consequences . . . are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against public interest. For years a battle of manœuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects . . . It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.'

Holt's Case was concerned with the effect of section 24, Finance Act, 1943, which was aimed primarily at the so-called 'whisky-ramp' of that time; this 'ramp' was effected by control of a company being obtained by a speculator and its stock sold to him at pre-war prices and then resold by him at the enhanced wartime value in such a way that neither the

company nor any of the persons concerned in, or benefiting from, the transactions became liable to the excess profits tax. The section enabled the Crown to assess the full excess profits tax that would have been due to the Revenue if the original company's trading stock had been sold in the first place at its full market value; these provisions were made to operate *retrospectively* from the inception of the excess profits tax. All persons who had in any way benefited from the main, or any *associated*, transactions were made liable jointly and severally, subject to certain reasonable safeguards against hardship, *e.g.* transferors of shares, who were not concerned in the various transactions apart from selling their shares in the *original* company, had their liability limited to the extent to which they had ' financially benefited '.

In the instant case the appellant had sold his shares in a company carrying on the business of distillers and whisky merchants for £38 7s. per share but the market value of these shares had been determined by the Appeal Commissioners, in accordance with the provisions of section 24, to be only £8 per share, with the result that the appellant's ' financial benefit ' amounted on this basis to over a million pounds. The appellant took objection *in limine* to the assessment made upon him on the ground that *mens rea*, or at least an ' awareness of the whole scheme ', was an essential prerequisite for the operation of the provisions of the section. In a similar case heard by the Court of Session last year, the Lords of Session had held that the shareholders of the *original* company ' who parted with their shares without any awareness of a scheme, actual or prospective, to realise stock so as to escape liability to the Excess Profits Tax ' were not caught by the section.

Lord Greene, M.R., in delivering the unanimous judgment of the Court of Appeal, was unable to follow the views of the Court of Session for he considered that they had been overmuch influenced by the possible hardships which might result from a literal interpretation of the words of the section upon certain states of fact. There was nothing in the section to suggest that *mens rea*, or even a general awareness of the scheme in question, was necessary to be proved on the part of the taxpayer; moreover the section, though penal, could hardly be said to act as a deterrent since its provisions had been made to operate *retrospectively* in respect of transactions which were legal at the time they were effected, however much they might appear to offend against the canons of social morality, Lord Greene considered that the sale of the shares in the original

company was an essential link with the *main* transactions by which excess profits tax was evaded and, on the plain words of the section, its provisions operated without the transferor of the shares in this company having to be fixed with a guilty knowledge of the schemes in question.

Leave to appeal to the House of Lords was given both in *Congreve's* and *Holt's Cases* and it will be interesting to see how far support will be given to the tax-evader's contention that the plain words of provisions aimed as such evasion must be cut down either on the ground of possible hardship or of the necessity of *mens rea* on the part of the taxpayer.

A. FARNSWORTH.

DESERTION—EFFECT OF OFFER TO RETURN

THE decision in *Thomas* v. *Thomas*, [1946] 1 All E.R. 170 is of considerable importance in matrimonial law in that it deals with the effects of a *bona fide* offer to return on the part of a deserting spouse. Some of the effects are well settled. Thus it is clear that it will bring the desertion to an end and if the party making the offer is the wife it will revive her right to maintenance: *Jones* v. *Newtown and Llanidloes Guardians*, [1920] 3 K.B. 381. In *Thomas* v. *Thomas* it was decided for the first time that a refusal of a *bona fide* offer to return will not only end the desertion on the part of the repenting spouse but will amount to desertion on the part of the hitherto innocent party. The decision is one by Lord Merriman P. and Hodson J. and the reasons underlying Lord Merriman's decision appear from the following passage of his judgment in [1946] 1 All E.R. p. 174:

> It is established beyond a shadow of doubt that by taking appropriate steps to repent the wife can re-establish the obligation of the husband to maintain her. The question is whether there is any reason why, by the same process, she should not turn the husband into a deserter without the preliminary of a restitution suit. Quite plainly, it is not necessary for the purpose of re-establishing her right to maintenance. I am bound to say that I can see no logical reason why the process which re-establishes her right to maintenance should not also establish her right to assert that the husband in his turn becomes the deserter, and in my opinion that is the inevitable conclusion from the well-known passage in the judgment of Warrington L.J. in *Thomas* v. *Thomas*, [1924] P. 194 at p. 201.

It is submitted with the greatest respect that there is a very forceful and logical reason why a deserting spouse should not be able to 'turn the tables' in this manner upon the deserted spouse. A *bona fide* offer to return will end desertion but it has never been suggested that it entirely eradicates the offence of desertion that has already been committed. That offence still survives though it has been terminated and it may for instance operate to revive an earlier condoned matrimonial offence under the doctrine of *Beard* v. *Beard*, [1945] 1 All E.R. 704. To hold that the deserted spouse is by refusing the offer to return committing in turn a matrimonial offence is equivalent to forcing the deserted spouse to condone the earlier matrimonial offence of the other party. Moreover it does not follow from the fact that a wife is entitled to maintenance that the husband must be guilty of desertion if he refuses to live with her. Thus where the husband leaves his wife because he has reasonable suspicion that she has been guilty of adultery—though in fact she never committed adultery—he may leave her without becoming guilty of desertion though he will still have to maintain her and the same applies where a husband leaves his wife because she persistently refuses intercourse: see *Glenister* v. *Glenister*, [1945] P. 30.

It is submitted that not much assistance can be derived from the passage in *Thomas* v. *Thomas*, [1924] P. 194 at p. 201 to which Lord Merriman refers. That was a case where a husband who by his cruel conduct had driven his wife away offered her that they should resume cohabitation. The husband had given no assurances of his good conduct in the future and in the circumstances it was held that the wife had reasonable grounds for refusing his offer. Warrington L.J. added '. . . I think the actual separation must continue to have the quality of desertion by the husband; otherwise (and Lord Merriman adds: these are the important words) I see no alternative except to regard the wife as deserting him, which would be impossible'. It is suggested that these last words—which incidentally were spoken purely *obiter*—amount to no more than that Warrington L.J. thought that there could not be a non-consensual separation of two spouses without one or the other being in desertion. This, however, is not now the law: see *Glenister* v. *Glenister* (above).

G. P. Reyburn.

RECENT PERIODICAL LITERATURE

Jurisprudence. B. A. WORTLEY: Keeping the Peace, 63 L.Q.R. 188; the article deals with the relations of peace, law, and order. A. L. GOODHART: Precedents in the Court of Appeal, 9 Camb.L.J. 349; the learned author criticises the current doctrine according to which the Court of Appeal is bound by its own decisions, the more so as it fails to remove uncertainty. ERNST RABEL: On Institutes for Comparative Law, 47 Col.L.R. 227. HUNTINGTON CAIRNS: Leibniz's Theory of Law, 60 Harv.L.R. 200. ADOLF A. BERLE, JR.: The Theory of Enterprise Entity, 47 Col.L.R. 343. The February, 1947, issue of the *Harvard Law Review* is devoted to Judge Learned Hand and his work. FELIX FRANKFURTER: Some Reflections on the Reading of Statutes, 47 Col.L.R. 527. C. PERRY PATTERSON: Jurisprudence of Oliver Wendell Holmes, 31 Minn. L.R. 355. HENRY ELLENBOGEN: The Doctrine of Stare Decisis and the Extent to which it should be Applied, 20 Temple L.Q. 503. AMOS J. PEASLEE: The Trend of the Law in England, 1947 Wisconsin L.R. 7. BENJAMIN H. CONNER: The Trend of the Law in France, 1947 Wisconsin L. R. 19. CECIL A. WRIGHT: Stone on Jurisprudence, 7 Univ. of Toronto L.J. 227; this is a review of Professor Stone's book '*The Province and Function of Law*'. E. C. S. WADE: The Aim of Legal Education, 9 Camb.L.J. 288.

Constitutional Law. S. C. BIGGS: Treason and the Trial of William Joyce, 7 Univ. of Toronto L.J. 162. BERNARD SCHWARTZ: Executive Power and the Disappearance of the Law, 21 N.Y.U.L.Q.R. 487. LESLIE L. ANDERSON: Recovery from the United States under the Federal Tort Claims Act, 31 Minn.L.R. 456. W. HOMER TURNER: The Fifth Horseman of the Apocalypse, 22 N.Y.U.L.Q.R. 19; this is an examination of the American Government's powers over finance. LOUIS L. JAFFÉ: An Essay on Delegation of Legislative Power, 47 Col.L.R. 359, 561. R. J. MATAS: Treaty Making in Canada, 25 Can.Bar R. 458. H. LAUTERPACHT: Allegiance, Diplomatic Protection, and Criminal Jurisdiction over Aliens, 9 Camb.L.J. 330; this is a discussion arising out of the Joyce trial.

Administrative Law. RAY A. BROWN: The Federal 'Administrative Procedure Act', 1947 Wisconsin L.R. 66. BERNARD SCHWARTZ: Executive Powers, etc.; see *Constitutional Law.* E. C. S. WADE: The Courts and the Administrative Process, 63 L.Q.R. 164; Professor Wade discusses the

problem how the exercise of discretionary powers can be controlled by the courts without a substitution of the courts' discretion for that of the executive. He sees the solution in the introduction of new standards, conceived in terms of duties to the public, and capable of judicial application. T. A. Blanco White: Ministerial Decisions and Natural Justice, 11 Conv.(n.s.) 244; the argument hinges on the distinction between judicial and administrative acts of Ministers.

Family Law and the Law of Persons. Adolf A. Berle, Jr.: The Theory, etc.: see *Jurisprudence.*

Law of Property. Vladimir Gsovski: Soviet Law of Inheritance, 45 Mich.L.R. 291, 445.

Law of Contract. G. C. Cheshire and C. H. S. Fifoot: *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, 63 L.Q.R. 283; if the terms of an agreement are not strictly complied with, will equity uphold the variations? R. Else Mitchell: Is a Surety's Liability Co-extensive with that of the Principal Debtor? 63 L.Q.R. 355.

Law of Tort. Leslie L. Anderson: Recovery from the United States, etc.; see *Constitutional Law.* John P. Dawson: Duress Through Civil Litigation: I, 45 Mich.L.R. 571. E. O. Walford: Strict Liability. Some reflections upon *Read* v. *J. Lyons & Co.*, 11 Conv.(n.s.) 259.

Mercantile Law. Adolf A. Berle, Jr.: The Theory, etc.; see *Jurisprudence.* Stefan A. Riesenfeld: The Evolution of Modern Bankruptcy Law: a comparison of the recent Bankruptcy Acts of Italy and the United States, 31 Minn.L.R. 401.

Industrial Law. Law and Contemporary Problems, vol. 12, No. 2, contains several articles on labour dispute settlement. W. Willard Wirtz: On Teaching Labor Law, 42 Ill.L.R. 1.

Civil Procedure. A. L. Goodhart: Precedents in the Court of Appeal; see *Jurisprudence.* John P. Dawson: Duress, etc.; see *Law of Tort.* A. W. Johnson: Poor Man's Law in Manitoba, 25 Can.Bar R. 478.

Criminal Law and Procedure. H. O. Smith: The Power of Quarter Sessions to Grant a Special Case, 63 L.Q.R. 214. H. Lauterpacht: Allegiance, etc.; see *Constitutional Law.* S. C. Biggs: Treason, etc.; see *Constitutional Law.* John Otto Reinemann: Juvenile Delinquency in Philadelphia and

Economic Trends: the relationship between business cycles and delinquency figures during the past twenty-three years, 20 Temple L.Q. 576. Alexander Holtzoff: Administration of Justice in the United States Army, 22 N.Y.U.L.Q.R. 1.

Conflict of Laws. G. C. Cheshire: Plea for a Wider Study of Private International Law, 1 Internat.L.Q. 14. Arthur Nussbaum: American-Swiss Private International Law, 47 Col.L.R. 186. Arthur Lenhoff: Attacks on Vulnerable Foreign Divorces: Outposts of Resistance, 21 N.Y.U.L.Q.R. 457. Martin Wolff: A New Doctrine on Private International Law, 63 L.Q.R. 323; this is a review of Professor J. P. Niboyet's '*Traité de Droit International Privé Français*', vol. 3.

International Law. S. W. D. Rowson: British Prize Law, 1944–46, 63 L.Q.R. 337. H. Lauterpacht: Allegiance, etc.; see *Criminal Law.* F. B. Schick: Law or Politics for the Maintenance of Peace, 59 Jurid.Rev. 50. Sir Arnold D. McNair: International Law in Practice, 1 Internat.L.Q. 4. Philip C. Jessup: The Subject of a Modern Law of Nations, 45 Mich.L.R. 383. Alger Hiss: The General Assembly of the United Nations, 41 Ill.L.R. 591. Manley O. Hudson: The Twenty-fifth Year of the World Court, 41 Am.J.Int.L. 1. George A. Finch: The Nuremberg Trial and International Law, 41 Am.J.Int.L. 20. Quincy Wright: The Law of the Nuremberg Trial, 41 Am.J.Int.L. 38. Emilio von Hoffmannsthal: War Crimes Not Tried under Retroactive Law, 22 N.Y.U.L.Q.R. 93. C. J. Colombos: The United Nations Charter, 1 Internat.L.Q. 20. Philip C. Jessup: Modernisation of the Law of International Contractual Agreements, 41 Am.J.Int.L. 378. R. J. Matas: Treaty Making in Canada; see *Constitutional Law.* F. B. Schick: War Criminals and the Law of the United Nations, 7 Univ. of Toronto L.J. 27. H. Lauterpacht: Allegiance, etc.; see *Constitutional Law.* Georg Schwarzenberger: The Inductive Approach to International Law, 60 Harvard L.R. 539; the learned author suggests that international law should at the present time not be deduced from general principles or from sources selected ad hoc and at random, but that the wealth of the available material (state practice, etc.) should be utilised extensively and systematically. Georg Schwarzenberger: International Law and Society, Year Book of World Affairs, Vol. I (1947), 159.

W. A. Steiner.

REVIEWS

JURISPRUDENCE. By SIR JOHN SALMOND. Tenth edition by GLANVILLE L. WILLIAMS, LL.D. (Sweet & Maxwell, Ltd. 1947. xxxi and 548 pp. 30s.)

Dr. Glanville Williams has made a praiseworthy effort to achieve the impossible. Whether a book on jurisprudence can be edited at all is very doubtful. *Salmond on Jurisprudence* clearly cannot. 'This is Salmond's book', says the editor, 'not mine, and in most matters I have subordinated my opinions to his.' But many changes had to be made if the book was to retain any value for a student and the result is uneven and contradictory in places. Dr. Williams could either have been completely self-effacing, in which case the edition could not have had any value, or have issued an argumentative commentary on the text. But the middle way was bound to lead nowhere.

There is, of course, much to be said in favour of the new edition. The ninth edition was almost unreadable with its constantly varying type and deferential square brackets which put much of the text into a mental as well as an actual parenthesis. Now an Appendix contains notes on the text which itself has been altered and added to considerably. New passages on the sociology of law, the British Dominions and the value of the doctrine of precedent, fill a few of the gaps. A large number of smaller additions have been made and the Appendix includes critical notes on Salmond's idea of natural justice and on his definition of civil justice as the enforcement of rights contrasted with criminal justice as the punishment of wrongs. References to new articles and books abound. The eighth edition was an Authorised Version; the ninth a Revised Version; the present edition is a bible 'designed to be read as literature'.

The first criticism is against the author rather than the present editor. The avowed purpose of the book is to analyse the principles of the actual legal system but the further one reads, the more is one convinced that the author is not concerned with the *nature* of these principles but with their literal meaning. The book reads like a lesson in semantics, definition on definition. Thus in the analysis of rights are listed those perfect and imperfect, positive and negative, *in rem* and *in personam*, proprietary and personal, *in re propria* and *in re aliena*. Each is distinguished laboriously from its

opposite. Perfect rights are enforceable by law, their opposites are not. Positive rights are correlative to positive duties and negative rights, whereas negative rights are correlative to negative duties and positive wrongs. Again, the author writes: 'An act may be wholly unintentional, or wholly intentional, or intentional in part only. It is wholly unintentional if no part of it is the outcome of any conscious purpose or design, no part of it having existed in idea before it became realised in fact. . . . An act is wholly intentional, on the other hand, when every part of it corresponds to the precedent idea of it . . .' and so on. Earlier, in the first chapter on the nature of law the student is introduced to imperative, physical or scientific, natural or moral, conventional, customary, practical or technical, international and, finally, civil law. In the next chapter the various uses of the phrase 'civil law' are discussed—the law of the land, Roman law, non-criminal law, non-military law—and are distinguished from positive law and municipal law which are held to be improper substitutes for the term. Words begin to lose their meaning under this treatment. (Another great analyst, Austin, produces a similar claustrophobic effect.) As an introduction to a philosophical discussion wherein we are to use these words precisely, such analyses might be valuable. In a student's textbook on jurisprudence we expect to find an examination of the nature of law; instead, we are subjected to page after page on the meaning of the word 'law'. In another place[1] Dr. Williams has said that the largest of jurisprudential controversies—concerning the word 'law'—is 'a verbal dispute and nothing else', and dismisses Salmond's proposition that there is no law independent of the State as a tautological restatement of Salmond's definition. We cannot quote a more apt authority for this general criticism of the book under review.

The second criticism is that, despite the efforts of Dr. Williams (or because of his respect for the text), *Salmond on Jurisprudence* is out of date. For example, when dealing with the section on the State, the editor utterly fails to sit either on Salmond's stool or his own. To Salmond the primary and essential operations of a State are the waging of war and the administration of justice. Other operations such as 'teaching children' or 'feeding the poor' are secondary and non-essential. Dr. Williams scotches this rather left-handedly; he claims that he has tried to preserve the main line of his author's thought, with modifications. But he is not ambidextrous, and while preserving Salmond's idea of what are

[1] 'International Law and the controversy concerning the word "law"' (*British Year Book of International Law*, 1946).

the primary and secondary State functions, he adds, ' We have moved away from the nineteenth century idea of the police State, negative and repressive, to a new conception of the social service State '. And here, surely, for the student, Salmond plus Williams equals confusion. On the other hand, the editor leaves untouched Salmond's Appendix on the theory of sovereignty where, after stating that legislative sovereignty resides in the Crown and the two Houses of Parliament while executive sovereignty resides in the Crown alone, the author continues: ' It will be understood that we are here dealing exclusively with the law or legal theory of the constitution. The practice is doubtless different; for in practice the House of Commons has obtained complete control over the executive government. In practice the ministers are the servants of the legislature and responsible to it '. The editor makes no comment. Again, Salmond dealt with delegated legislation in twelve lines stating: ' a statute occasionally entrusts to some department of the executive government the duty of supplementing the statutory provisions '. Dr. Williams does not enlarge this section but contents himself with changing the word ' occasionally ' to ' frequently '. Salmond's treatment of sources generally is inadequate. The question of the legal efficacy of custom is not debated and the account of the principles of statutory interpretation slides over all the criticisms and most of the difficulties. A decision of the Court of Appeal is, to Salmond, conditionally binding on the House of Lords; it is surely simpler and more accurate to say that the House of Lords is not bound by a decision of the Court of Appeal but that, very exceptionally, the House of Lords will confirm a decision although it is founded in error because public convenience is in the particular case regarded as more important than legal accuracy.

Almost any legal subject can be discussed under the title of jurisprudence. Salmond deals with the definition of ' law ' in 130 pages, the sources of law in 75 pages and the elements of law (rights, ownership, possession, persons, titles, liability, intention and negligence, property, obligations and procedure) in 259 pages. Despite the almost universal practice, there seems little that the student will gain from the study of these elements as abstract concepts when he has already studied them in the case law of tort, contract and real property. Jurisprudence should surely deal primarily with the history and theory of the nature of law, including a study of the sources of law and the relation of legal to political theory, and secondly with the position of law in the modern State. Jurisprudence is the study of law as an applied science and not a soulless dissecting of the meanings and uses of words.

This is undoubtedly the best edition of Salmond's *Jurisprudence* that has appeared and Dr. Williams has raised the book from its death-bed. The only question is whether this was an act of kindness.

J. A. G. Griffith.

Making International Law Work. By George W. Keeton and Georg Schwarzenberger. Second edition. Library of World Affairs, No. 1. (London: Stevens. 1946. x and 261 pp. 12s. 6d. net.)

The great merit and success of this book—when it first appeared shortly before the war—rested on the freshness of its approach. It was and is not a textbook, but an intelligent and lucidly written analysis of some of the foundations and conditions of international law. Such chapters as 'The Social Background of International Law' or 'The Functions of International Law' (now divided into two chapters on 'The Functions of International Law' and 'The Functions of International Morality') are important contributions to the study of the inter-relations between international society and law, and the learned authors can claim no mean share in the existence of a more widespread and intelligent appreciation of these inter-relations which prevails today among students of international affairs (including some lawyers).

It was no easy question how to re-edit such a book after more than seven years of war and shattering world events. The authors have chosen to retain the general chapters almost unchanged, though rearranged, and to replace the more specific chapters, *e.g.*, on the Pacific Settlement of International Disputes and on the Problem of Supra-National Federation, by some new chapters analysing, in the main, the United Nations Charter and the prospects for international order resulting from it. To the present reviewer, the omission of the very suggestive chapter on Federalism, including the discussion of Regional Unions, the comparison with the British Commonwealth of Nations, is a matter of great regret. If there was a tendency to overrate and over-discuss federalism as a world cure, from shortly before the war until 1940, the pendulum has swung too much in the other direction now. Obviously, the problem of regional federal associations, within the framework of the United Nations, is a very burning and practical issue. It might well have stayed in, though in a revised form, instead of the considerable repetition in the discussion of the main provisions of the United Nations Charter (in chapters 6 and 7). Again, a rather more detailed discussion of the extent to which developments in the social structure of states do or do not affect the working of international law, in view of its steady

expansion in the field of social and economic relations, might well have replaced the repeated discussion of the principles of national sovereignty and consent as the stumbling blocks to international law—surely this is now commonplace. The discussion of the different parts and functions of international law—corresponding to the difference between society and community—and the relative stability of some parts as compared with others is most stimulating and suggestive. But is the conclusion that international law, with its present foundations, is essentially sound, or is it the opposite? On the whole, the conclusion appears to be—rightly—that international law today is largely the legitimation of force concentrated in the national sovereign state, and will remain so until the United Nations Charter becomes reality. But it is, perhaps, not unfair to suggest that the learned authors are not always consistent. That they hover between optimism and pessimism is not so surprising. Most of us do. But how do they reconcile the careful and fundamentally negative assessment of the functions of international law under national sovereignty with the statement (on p. 113) that international law has survived astonishingly well the host of ingenious horoscopes cast regarding its future by magi in many lands? Has it? Certainly the critics assailed by the author of chapter 7 cannot be so simply divided, as suggested, into two schools, one utterly sceptical, the other full of rosy optimism and utopian schemes. I know of no critic worth mentioning who has not admitted the continued existence and validity of some parts of international law, such as the Geneva rules and many rules of international intercourse, while stressing the revolutionary effect of social developments (such as totalitarian warfare and the transfer of decisive functions from the private to the public sphere) and the destructive effect of the survival of national sovereignty. Among these critics, one should think, are the authors themselves.

It is in recognition of the great merit of this book, and with the certainty that it will soon need a new edition, that a more fundamental criticism is put forward.

The general observations on the moral and social foundations of international law were vital in 1939. But, for a book with the bold title *Making International Law Work*, these observations lose in novelty and importance for the chastened world of 1947, by comparison with some other tasks. The new edition has possibly been completed about six or twelve months too early. Its new chapters were written under the impact of the just-completed, but still unproven, United Nations Charter. Meanwhile, we know a lot more about its working, disillusioning knowledge though it is. We have also had before us the working of UNRRA and the beginnings of some other

functional institutions. We have had the Nuremberg judgment and trial, with its vital significance for the moral and social foundations of international law. We have had the discussions on the international control of atomic energy.

Our main problem is now less the diagnosis of what international law should be, than the question of means and ends. Not much can be done until the fundamental outlook of governments and peoples towards the international community changes radically. But the objectives of this excellent book could, it is submitted, be better fulfilled if the next edition were recast in something like the following pattern: A general part should retain the first four chapters, and a special part, starting from a discussion of practical experiments and developments, should discuss the impact of structural, social and economic changes on the scope and working of international law; the possibilities of development through functional international institutions; the practical possibilities of international control; the possibilities and conditions of the development of international law, through international case law, and, in particular, the foundations of the Nuremberg trial.

One small point. The absence of footnotes is entirely justifiable in a work of this kind, but the very frequent use of verbatim quotations without reference is irritating to the serious student who might wish to follow up the quotation in its context.

W. Friedmann.

Leading Cases in Common Law, with Notes, explanatory and supplementary. By Cockle and Hibbert. Third edition by H. J. S. Jenkins, of the Inner Temple, Barrister-at-Law. Two Vols. (London: Sweet and Maxwell, Ltd. 1945. pp. xxiv and 515 (Contracts), and pp. xii and 403 (Torts). £1 12s. 6d. net.)

A reviewer's opinion of any casebook is inevitably influenced by his opinion of the value of casebooks in general, and a recent writer in this quarterly has championed the cause particularly of those which favour the method of abridging facts and judgments. All modern casebooks no less than other epitomes and short cuts are prima facie pernicious, and the only answer to the accusation that they are potted learning is that nevertheless they are necessary. But if they are not justified by specific reasons, the presumption against their use stands unrebutted. Casebooks are guilty until proved innocent.

The arguments advanced in support of the use by students of casebooks are many and contradictory. The most popular (that the time of a student is short and the amount of law

to be learnt considerable) is somewhat offset by the most confused (that a student may with great advantage compare the extract of the judgment with the original). There may be lecturers who agree with Caporn that the explanation of principles is made easier if the student has the relevant case open before him; the present writer at least is of opinion that there are already enough distractions between the lecturer's mouth and the student's mind without asking the student to read as well as to listen. In the above-mentioned article Langdell is quoted in support of the idea that casebooks by putting caselaw in its proper perspective enable the student more easily to grasp the truth that cases are merely illustrative of the fundamental principles of law. This last phrase, if it means anything, must be distinguished from the *reasons for a decision* which may vary from the following of precedents to the court's sense of what is just and from the *reason of a decision* or ratio decidendi which can be deduced from an examination of the facts treated as relevant and the conclusion reached. The student who grasps these two latter conceptions may well leave to the more contemplative period of his life a consideration of the relation of legal principles to general philosophy. To tell him at the outset of his study of the common law that cases are ' merely illustrative ' is certainly a danger and partly false teaching.

When J. W. Smith published his *Leading Cases* in 1837 he was tackling the problem of how to direct students to those cases in the law which have established principles. Today, the textbook and the lecturer give the student the direction he requires, and casebooks fall into one of two classes: either they are expressly supplementary to a textbook or they are not. Professor Winfield's *Cases on the Law of Tort* is an example of the first class; the book under review is an example of the second. Let us consider the problem from the point of view of a student studying the tort of Negligence from Professor Winfield's textbook. In twenty-eight pages of the text he finds that the facts and decisions of fifteen cases are cited in full; in six of these fifteen, part of the judgment is quoted. He has been told that if he wishes to understand the common law he must read the arguments in the judgments; that a knowledge of the decision and the facts only is like knowing the feet and head of a person: the linking digestive organs must also be studied. So the student turns to Cockle and Hibbert's cases, perhaps because he knows that there are more cases summarised in this book than in Professor Winfield's own casebook. He finds seven definitions of the Duty to Take Care, culled from various cases, followed by ten cases on the tort. These ten cases he has already met, so far as their facts and decisions are concerned, since they are of the fifteen dealt with

in the textbook. Of the thirty-four pages in the casebook devoted to Negligence *Donoghue* v. *Stevenson* absorbs nearly one-third; it is followed by three cases on the proof of negligence, and six cases on contributory negligence, including a report of six pages on *The Eurymedon*. What useful purpose does this collection of cases on the tort of Negligence serve for the student, armed with his textbook and assisted by his lecturer? He does not need the direction he should follow pointed out for a third time; he does not want yet a third note on the cases: if it be argued that the casebook editor has by cutting and pruning relieved him of the labour of discovering the essence of the case, the answer is twofold. First, that the ability to separate the essential from the non-essential is the basis of the legal approach and can only be acquired by practice, and second, that the lecturer will normally have indicated how best the student's limited time may be spent. He will, at some time or another, have said something like this: 'For the majority of cases in this tort, as in others, it is sufficient if you acquaint yourselves with the arguments of the textbook (remembering what I have already suggested to you) together with the facts and decisions of those cases cited in the textbook and by myself. But there are certain cases which you should read in the reports because the judgments there embody the law. In the case of *Donoghue* v. *Stevenson* it will be sufficient if you read the judgments of Lords Atkin and Macmillan. In *The Eurymedon*, note particularly the five rules suggested by Greer, L.J., and the comment on the fifth of them by Scott, L.J. In general, you may safely read very quickly through those parts of the judgments which deal with the authorities quoted by counsel unless you find that a previous case in particular is regarded as binding or having great persuasive power', and so on.

The position of a casebook which does not supplement a specific text is in fact most precarious, for to be intelligible at all it has to supply its own text in the form of notes. No one, of course, claims that a student can learn his law by studying a casebook alone, however heavily it may be annotated. The cases chosen will not altogether correspond with those chosen by the textbook author and the student will sink under the flood of cases if he tries to swim with an authority tucked under each arm.

It is suggested that in fact this type of casebook has outlived its purpose, that its function has been largely superseded by the textbook and that the sooner students resume the study of leading cases in the reports the better.

It only remains to state that, as a casebook, this present edition in two volumes is excellently done. The facts are stated succinctly, the excerpts from the judgments have been chosen

with care and accuracy, and the notes (which as the learned editor states, ' for better or for worse have always been a prominent feature of this work ') will be of value to that small number of students who have enough time to read them. Some cutting-down has been necessary in this edition, primarily at the expense of that miscellany ' Contracts and other common law matters of a special nature '. All that now remains under this heading are Agency, Bailments, Carriers, Gifts and Innkeepers, while some of the remainder have been included elsewhere. Most of the ' connective ' notes have been eliminated, only those being retained which in the learned editor's opinion ' might do more good than harm '. He adds, ' this absence of planned uniformity may well be a grievous fault ', and seems by so saying almost to agree with the present reviewer's attitude to casebooks in general.

J. A. G. Griffith.

Gore-Browne's Handbook on the Formation, Management and Winding Up of Joint Stock Companies. Fortieth Edition by P. J. Sykes, Harold Lightman and Stanley Bowie. (London : Jordan & Sons, Ltd. cviii and 996 pp. (with index). 30s. net.)

When a law book has reached its fortieth edition there can be no question as to the estimation in which it is held by practitioners, though very often to an academic lawyer such age would argue that it would be better dead and buried. There can indeed be no question that a number of ancient legal textbooks survive by virtue of a kind of inertia, and that it would be more satisfactory for both branches of the profession if they were replaced by something entirely new.

Gore-Browne, which was written to explain the epoch-making Companies Act, 1862, is the only important survivor of the textbooks of that era. The rewriting which it has constantly undergone has been unusually well done, and the book retains remarkably few traces of its early origin. Its workmanlike and lucid handling of a complex and always rapidly developing subject has always won it a prominent place on the shelves of city solicitors, accountants, company secretaries, and indeed all those who require a common-sense and straightforward appreciation of the law devoid of jargon and too much subtlety.

A careful perusal of this new edition would be possible only to a reviewer with much more leisure than the present one. A sufficient survey has, however, been made to make it evident that the new editors have worthily maintained the high standard of scholarship and exactitude which for many years

His Honour Judge Haydon, K.C., brought to the task of editor. The war-time difficulties which involved Mr. Lightman succeeding Mr. Sykes for some period have been successfully overcome and an excellent piece of work accomplished.

There have during the nine years since the last edition been many decisions of an important, if not of an outstanding, character. These have been noted up. Apart from these the principal feature of this edition is an Appendix of some twenty-five pages on War Emergency Legislation.

C.

Trade Mark Practice at the Patent Office. By Irene G. R. Moses, Barrister-at-Law. (London: Waterlow & Sons, Ltd. xx and 334 pp. 25s.)

Legal works can be divided into two classes: philosophical or theoretical books and practical books. Mrs. Moses' book is a severely practical book; she describes the law of trade marks and the practice at the Patent Office as it is, and makes no attempt to examine trends, developments, underlying ideas or reform. Within these limitations the book is complete, correct, clear, consistent and most useful. It contains all Acts, regulations and case law (up to January, 1946) relevant to trade mark practice at the Patent Office. Infringement proceedings and other High Court litigation are outside the scope of the book, but the Table of Cases, the very useful alphabetical Table of Trade Marks, as well as the law and the facts given in the text and the appendices, will be helpful not only to the practitioner at the Patent Office but to every reader interested in the problems of trade-mark law generally.

Apart from Bray and Underhay's *Trade Marks Act*, 1938, which is a Supplement to Kerly, published immediately after the new Trade Marks Act came into force in 1938, this is the first work dealing extensively with the many important changes introduced by the Trade Marks Act, 1938, and the recent decisions interpreting the provisions of the new Act.

For example, on pp. 77–78 the author discusses the effect of the decision in the *Ferodo Case*[1] on the interpretation of the provisions of section 27 relating to 'defensive registration'. Under section 17 a trade mark can be registered only if it is used or proposed to be used by the applicant in relation to the class or specification of goods covered by the application. Moreover, under section 26 a trade mark can be expunged from the register if there was no *bona fide* intention to use it at the time of the application, or subsequently if for

[1] (1925) 62 (not 65 as stated in the footnote on p. 78) Reports on Patent Cases p. 111.

a continuous period of five years there has been no *bona fide* use in relation to the goods for which it is registered. However, under section 27 a very well-known trade mark, such as, for example, 'Kodak', can be registered by the Kodak Company not only for cameras for which it is used, but also 'defensively', say, for bicycles for which it is not used by the Kodak Company, provided confusion in the mind of the public is likely to arise as to the common origin of the goods if another manufacturer is allowed to sell his bicycles under the 'Kodak' brand. Mrs. Moses explains in what way the *Ferodo Case* establishes a heavy onus on applicants for defensive registration to prove the likelihood of confusion in the minds of the public.[2] The new U.S. Trade Marks Act, 1946, solves the same problems in a simpler way in section 32 (1) by giving protection against any use of a registered trade mark which is 'likely to cause confusion or mistake or to deceive purchasers as to the source of origin of goods or services' and omitting the requirement of the old law that the merchandise had to be 'of substantially the same descriptive properties as those set forth in the registration'.

The second innovation of the British Act of 1938 discussed in detail in Mrs. Moses' book on p. 80 ff. concerns the provisions of section 28 dealing with 'registered users'. Ordinarily the grant of a licence to use a trade mark or even mere passive acquiescence in its use by others on the part of the proprietor will render a trade mark invalid and liable to be expunged from the register. However, under section 28 the proprietor may permit others to use the mark, provided that they are entered on the register as registered users, that the proprietor retains proper control of the mark and that the Registrar is satisfied that the permitted use will not be contrary to the public interest. A precedent for a Registered User's Agreement which would satisfy these requirements is given on p. 274 of Mrs. Moses' book. The new U.S. Trade Marks Act, 1946, solves this problem in a simple way in sections 5 and 45 by providing that use by related companies controlled by the registrant shall not affect the validity of a trade mark.

In other respects, *e.g.*, on certification marks, the U.S. Act of 1946 adopts in section 4 the provisions of the British Act of 1938, s. 37. This British section is discussed in detail by Mrs. Moses on p. 72 ff., and interesting precedents for Certification Marks' Regulations are given on p. 275 ff.

Perhaps the statement on p. 59 that 'the task of obtaining

[2] It might be helpful for the reader if it were stated in the next edition that the *Ferodo Case* dealt with brake linings and that the defensive registration for pharmaceutical goods, tobacco and smokers' requisites was refused by the Registrar and on appeal by the Court.

reversal of the Registrar's decision by the Court is almost always one of considerable difficulty' goes rather far. The Courts will not ordinarily interfere in cases where the decision depends on the way the Registrar has exercised his discretion under the Act. However, as was said in *Hack's Application*,[3] the question whether a mark is prohibited from registration is a question of fact; that fact can be reviewed by the Court, and while it does not happen frequently, the Court can and does from time to time find that the Registrar erred on the establishment or appreciation of the facts. In this connection it is interesting to note that applicants who are aggrieved by a decision of the Registrar, under section 17 (4), have the choice of appealing to the Board of Trade or the Court. In practice they invariably elect to appeal to the Court, which shows that they have more confidence in His Majesty's Judges than in the Executive.

In a book which is intended principally for use by practitioners, ample, detailed and well-arranged lists of contents, indices and tabulations are essential; in this respect there is room for improvement in the present book. More detailed information on fees and costs of registration—collected in one chapter and not dispersed on pp. 90, 194, 299 and 307—as well as data on average fees usually charged by patent agents, would be helpful. Finally some statistics on registration and other matters concerning trade marks—available in the Annual Reports of the Comptroller of the Patent Office—would enrich a second edition. These slight defects in form do not, however, detract from the intrinsic merit of the book, which is complete and correct on all material points of law and fact.

PETER MEINHARDT.

LEGAL FICTIONS. By A. LAURENCE POLAK. A series of cases from the Classics. Illustrated by DIANA PULLINGER. (Stevens and Sons. 1945. 6s.)

THIS is an extremely amusing book applying English law to disputes which arose or might have arisen in classical mythology. Modern titles are combined with ancient personal names: thus, in the Probate, Divorce and Admiralty Division (Divorce), 'Squadron-Leader Amphitryon, of "The Lodge", Thebes, petitions for dissolution of his marriage on the ground of the adultery of his wife, Alcmene, with Mr. Jupiter, who is said to reside at "The Mount", Olympus'. Or again, in the King's Bench Division, 'Mr. Daedalus, a well-known

[3] (1941) 58 Reports on Patent Cases, p. 91 at 108, quoted by Mrs. Moses on p. 59, footnote 26.

aeronautical engineer, brings an action in his representative capacity, as administrator for his late son, Icarus, against Daedalus & Son, Ltd., a company engaged in aircraft manufacture and design, against whom he claims damages for negligence and breach of warranty'. Altogether ten cases are treated, all with delightful wit and humour; the author permits himself to transplant the personages into the present, so that modern statutes and precedents from recent litigation can be cited. Of the correctness of the law involved the lay reviewer cannot speak; but, apart from an incorrect statement that Menelaus and Helen were childless and one or two imaginative additions to the accepted stories, a wealth of mythological knowledge is shown.

As an example of the author's felicitous style, I should like to quote his modernisation of the Wooden Horse legend. In the course of his judgment in the suit brought by Mr. Menelaus of 'The Castle', Sparta, against his wife, Helen, and the co-respondent Mr. Paris, of 'The Towers', Troy, Mr. Justice Apollo says: 'The respondent, apart from her susceptibility to the attentions of the opposite sex, has one great weakness—almost, one might say, a passion—for those large and strident automobiles, of offensive odour and repellent aspect, known (for some reason which I am unable to fathom) as "sports cars". She awoke one morning to find a luxurious and well-appointed automobile of this type outside the front door, driven by a chauffeur in livery. She naturally concluded that it was a new present from the co-respondent, who was that day absent in the country. Thrilled with excitement, she ordered the chauffeur to drive it into the garage (connected with the house by a covered way, and hitherto bolted and barred against all comers), where she proceeded at her leisure to examine the glistening object. Scarcely had she entered it when the petitioner, who had (with some difficulty) concealed himself in the tool-box, emerged and, despite her cries, drove off to the jetty, where he embarked with her on a ship which was just leaving for Greece.

'The petitioner has been very frank with the court in disclosing his feelings on being thus reunited with his long-lost wife. His first impulse was one of jubilation, but he was careful to explain that in the confusion of capture and flight he had only a fleeting glimpse of her features. It was not until they were safely on the ship that he was able (as he cryptically expressed it) "to take a good look at her". What revulsion his feelings underwent in that moment it would be indelicate, even in a matrimonial court, to inquire. At all events it is clear that he occupied a separate cabin on board, and that this petition was presented within a few hours of his return. Something of the matter may be understood when it

is remembered that ten years had elapsed since her departure. "Was this" he exclaimed, "the face that launched a thousand ships?" He might well ask'.

A word of appreciation is due to the lively illustrations by Diana Pullinger, which in concord with the author's style humorously combine ancient and modern.

A. M. Duff.

The Death Duties. Tenth edition. By Robert Dymond, Solicitor and formerly Deputy Controller of the Estate Duty Office, assisted by R. K. Johns, ll.b., of the Estate Duty Office, Somerset House. (London: Solicitors' Law Stationery Society, Ltd. 1946. pp. xliii and 600. 55s. net.)

The worth of this truly classic work upon the abstruse and recondite subject of the death duties is amply attested by two facts: first, that this is the tenth edition since the original publication in 1913, and secondly, that the last edition was exhausted in little over three years since it appeared in 1942.

The inelegancies of the successive Finance Acts since 1894 dealing with the death duties stand out, and it is strange that the Legislature has never found time to codify or even to consolidate, as in the like case of the Income Tax laws, the many statutes relating to these duties which cover the century and a half since the enactment of the Legacy Duty Act of 1796. The field covered by the death duties is so extensive and the subject so involved that a detailed analysis of this well-known work would be out of place in the pages of this Review. Attention will, therefore, be called only to the more important changes made by the author since the last edition.

The text dealing with the highly complex provisions relating to transfers to privately-controlled companies has been partly rewritten in the light of Part VI of the Finance Act, 1944, and this portion of the work is illumined by some excellent practical examples, furnished by Mr. R. K. Johns, of the working of this part of the estate duty code (see pp. 57–68). Further light is thrown on the remission of duties on the estates of soldiers, etc., killed in war (Chap. 4, Sect. 18), while the provisions of the Finance Act, 1944, relating to enemy property (pp. 278–9) and the purchase of annuities from relatives (pp. 203–6) is fully considered. The recent Convention for the Avoidance of Double Taxation between this country and the U.S.A. is set out in full in Appendix I and annotated at pp. 240–1; a very useful new feature is the list of 'Administrative Concessions Relating to the Death Duties' (Cmd. 6559 of 1944), which will be found at the end of this appendix.

The layout of the book—a narrative text with the provisions of the relevant statutes fully set out at the end—is similar to that adopted by Mr. Konstam in his equally classic work on the other great branch of revenue law, income tax, and will be found of great assistance by the lawyer. The index appears fully adequate and to have been compiled with great care, while the table of cases, noted up to March, 1946, is indeed formidable, running to some seventeen closely printed pages. The work will be kept up to date by periodical supplements, the first of which, devoted to the provisions of the Finance Act, 1946, has already been published. The supplement annotates the provisions of the 1946 Act, which materially affected the law as to gifts, *inter vivos*, and the rates of estate duty, and notes judicial decisions up to December, 1946; the recent conventions, against double duties, with Canada and South Africa are set out in full and discussed by the author.

To conclude, this latest edition of a deservedly popular work can be thoroughly recommended to the legal profession.

A. Farnsworth.

The Death Duties. Second edition by G. M. Green, ll.b.lond., Solicitor; of the Estate Duty Office; one of the editors of *Tristram & Coote's Probate Practice*. (London: Butterworth & Co. (Publishers), Ltd. 1946. lxxxii, 972 and (index) 72 pp. 52s. 6d. net.)

When the first edition of this excellent work appeared in 1936 it leapt at once into that class of legal works aptly termed 'standard'. The second edition would have appeared many years ago but for the exigencies of the war; the delay has enabled the learned author to rewrite extensive passages in the light of later cases and statutes rather than merely to amend and bring up to date the original edition. Mr. Green has also taken the opportunity of dealing with the general law as it affects the death duties, with special reference to the order of application of assets in England (pp. 327–337). Though Mr. Green is a member of the Estate Duty Office, the work is entirely non-official; his position, however, probably accounts for the exclusion of any chapter devoted to the 'Mitigation of the Duties'—or should one say to their 'legal evasion'?—upon the omission of which one reviewer has already commented.

In a general law review such as the *Modern Law Review* any detailed analysis of the present work would be out of place. Attention will, therefore, be called to those sections of the book which appear to your reviewer to be of outstanding

value to the practitioner concerned with these all-pervading duties.

The chapter (No. 8) upon ' Valuation and Assessment ' is particularly clearly written, especially the section (No. 5) which deals with the valuation of stocks and shares. This brings your reviewer to the one criticism which he feels impelled to make regarding this work, even though it may be countered by the general lay-out of the book, namely, that consideration of the highly complex provisions of the Finance Acts of 1940 and 1944 relating to transfers to privately-owned companies is not to be found at one place, but references are scattered, some being noted in chapter 4, part 7, ' Benefits from Companies ', and others in the chapters relating to ' Exemptions and Reliefs ', pp. 149–151, and ' Valuation and Assessment ', pp. 261–267.

Chapter 10—' The Incidence and Adjustment of the Duties ' —is, perhaps, the most valuable in the book. The learned author here deals with the incidence of estate duty according to the respective interests of the beneficiaries and as between capital and income; he also considers the apportionment of the duty, firstly, as between the persons entitled to an annuity at death and the property subject to the annuity, and, secondly, as between the persons benefiting upon the cesser of an annuity. In the course of this chapter Mr. Green discusses three interesting questions relating to apportionment, *viz.*, where a legacy is given free of legacy duty but not free of estate duty (pp. 340–341), where new annuities arise upon the cesser of an annuity (pp. 346–348) and where a limited interest arises on death in respect of a settled fund or life policy (pp. 349–350). This chapter, and the similar one (No. 18) relating to the legacy and succession duties, should enable any practitioner confidently to advise upon the most complex issues where the interest of two potential taxpayers appear to conflict, the Crown only being concerned in obtaining payment of the appropriate duty.

The chapter (No. 19) on ' Foreign Elements ' is also noteworthy, and included here are such problems of general interest as the locality of assets—very well documented with case references—relief from double taxation and enemy property.

Another exceedingly valuable chapter (No. 25)—and one, too, which concerns the beneficiaries rather than the Crown—is that dealing with ' free of duty ' provisions in wills, settlements, etc. Mr. Green has collected here all the words and phrases which might be considered to import the beneficiary's freedom from the duties and has collated them with the appropriate decisions of the courts (pp. 687–693). He also deduces from the *trend* of English decisions upon this topic

three principles of general application which he fortifies by appropriate references, *viz.* :—

(1) ' The words " free of all duties " when used in regard to a fund . . . would be satisfied by applying them to the duties which would be paid at the time when the fund was handed over ';

(2) ' If the words " free of duty " refer not to the settled property itself but to the successive beneficial interests in it, the property is exonerated from estate duty on the deaths of the life tenants '; and

(3) ' A direction in general terms to pay death duties out of residue, or out of some other specified fund, applies . . . , in the case of estate duty, only to the duty leviable on the testator's own death '.

The headings of the various chapters are sufficient to describe the matter dealt with, while the whole of the relevant statute law—from the Legacy Act, 1796, to the Finance Act, 1946—is set out verbatim in Part I of the Appendix, which is connected with the main body of the work by cross-references therein. Part II of the Appendix contains all the apposite Statutory Rules and Orders relating to the death duties, including the recent conventions for the avoidance of double taxation between this country and the U.S.A. and Canada, annotated at pp. 608–615.

The paper, binding and general set-up of this work are almost on luxury lines and comparable with any pre-war legal work; the whole is worthy, indeed, of the eminent firm of legal publishers. The table of cases and the index are fully adequate, while both statute and case law are noted up to September 1, 1946. Comparison with other similar ' standard ' works would be invidious, but your reviewer has little hesitation in saying that no practitioner concerned with the administration of estates can afford to be without this most excellent work, which is to be kept up to date by the issue of supplements.

A. Farnsworth.

Legal Aid for the Poor. By Ernst J. Cohn and Robert Egerton. (London : Stevens & Sons, Ltd. 1947. 87 pp. 3s. 6d. net.)

The publishers are fortunate to have secured the services of the present authors for this volume of their ' This is the Law ' series. Dr. Cohn's contributions on the subject of legal aid for the poor to periodicals, both legal and popular, have attracted much attention. Mr Egerton is the author of an admirable historical and descriptive survey of the subject published some two years ago (see Mod.L.Rev., vol. ix, p. 92).

This little volume is severely practical in character, being

intended as a short guide for those who are not familiar with the subject, whether they want information for the purpose of actually seeking legal aid or advice or whether they need it for the purpose of the legislative proposals which are expected shortly for the purpose of implementing the report of the Rushcliffe Committee.

The volume deals clearly and succinctly with the facilities available for legal advice both to civilians and to members of the armed forces of the Crown. It also describes the provisions existing for legal aid both in civil and criminal courts. There is a chapter on the proposals made in the Rushcliffe Report, and some useful appendices giving the towns where legal advice centres are available and the addresses of Home Command Legal Aid Sections and of Poor Persons' Committees. The volume for its size could hardly be bettered.

CHORLEY.

QUARTER SESSIONS HANDBOOK. By LINTON THORP, K.C., and RAYMOND E. NEGUS. Second edition by the authors. (London: Stevens & Sons, Ltd. viii and 128 pp. with index. 6s. net.)

THIS little book has been compiled by the Chairman and the Clerk of the Essex Court of Quarter Session in connection with, and for the purposes of, the cases actually coming before that Court and its Appeal Committee. Mr. Thorp and Colonel Negus have both had a most varied experience of Court work at home and overseas, and their notes are of great practical value, as is evidenced by the fact that a second edition has been called for in less than three years.

The method pursued is strictly that of an alphabetical dictionary, and the fact that apparently only in those cases where the need for a note was found was a note made, means quite a number of gaps which no doubt the authors will fill in as time goes by and more cases come before them. Personally, as a Chairman of Quarter Sessions, I should appreciate rather fuller treatment of such matters as Punishment: nothing is said about Borstal, Approved Schools, Imprisonment, for example, though there is a long note on Probation.

C.

THE ALIEN AND THE ASIATIC IN AMERICAN LAW. By MILTON R. KONVITZ. Cornell University Press. (London: Geoffrey Cumberlege. 1946. xiv and 299 pp. Price 18s. 6d.)

THE major part of this book is devoted to a review of the practice of the United States Supreme Court in regard to aliens and American citizens of Asiatic descent (mainly Japanese and

Chinese). Though the title at first seems a little incongruous and a perusal of the book provokes the question why the Negro problem has been excluded from it, the reader will benefit greatly from this sober yet warm-hearted, thorough yet stimulating presentation of material with which few English lawyers are conversant, but which deserves our attention. From the point of view of American law important questions of constitutional law are involved in the subject. From the point of view of the English onlooker it is the unsuspected existence of those problems and the method and, particularly, the spirit of their solution that makes this book most interesting reading.

Who in this country knows that in the United States only an alien 'being a free white person' or of African nativity or descent is eligible for naturalisation? Japanese, Koreans, Hawaiians, (until 1943) Chinese, Hindus, Afghans, Burmese and perhaps Parsees and Arabs are excluded; and it is only since 1940 that the naturalisation of descendants of races indigenous to the Western Hemisphere (Indians, Mexicans, Eskimos, etc.) has become permissible. And who knows that line of Supreme Court decisions beginning with *Ozawa's Case*, 260 U.S. 178 (1922), in which the court was called upon to define a white person? It seems that 'men are not white, if the strain of colored blood in them is a half or a quarter or, not improbably, even less, the governing test always being that of common understanding' (*Morrison* v. *California*, 291 U.S. 82 (1934) *per* Mr. Justice Cardozo); it is common speech, not scientific origin that decides.

Or who knows that until 1946, when the Supreme Court decided *Girouard* v. *United States*, pacifists who professed unwillingness to carry arms could not be naturalised in the United States on the ground that their beliefs were inconsistent with such attachment to the principles of the Constitution as is a pre-requisite of the grant of citizenship?

Under American law naturalisation may be revoked, if it was fraudulently or illegally procured. There are three decisions defining the circumstances under which adherence to Communist or Nazi views may justify revocation. In memorable words the court declared through Mr. Justice Murphy that its judgment must be guided

> 'by the spirit of freedom and tolerance in which our nation was founded, and by a desire to secure the blessings of liberty in thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native born'.

It is with surprise that one learns of the long and frequently puzzling list of occupations which, under State law, are reserved to citizens or declarants. In Michigan aliens cannot have

the occupation of, inter alia, chiropodists, embalmers, engineers, wrestling promoters, realtors, barbers, teachers, registered nurses. In New York and Georgia the list of reserved occupations includes that of a bank director; many States include physicians, dentists, and architects, all States include attorneys. The question to what extent such legislation is permitted under the equal protection clause of the Fourteenth Amendment has often come before the court: all legislation which fails to show a necessary or rational connection between alienage and peril to the public welfare is discriminatory.

In his last chapter the author deals with the legal position of Americans of Japanese ancestry in World War II. It will be remembered that after Pearl Harbour a large number of such persons living on the West Coast was subjected to intensive measures of restriction. The problem is now only of historical significance, but its treatment by the Supreme Court remains a matter of almost exciting interest. A comparison with the reaction of Parliament and large sections of the public to the wholesale internment of refugees in 1940 is readily at hand. The cases summarised by Mr. Konvitz are full of lofty statements proclaiming the liberty and quality of all subjects. The controlling principle was formulated by Mr. Justice Black:

> 'Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can'.

It was on the interpretation of the facts rather than on the principle that in two out of the three leading cases the court divided.

The English reader will be grateful for a book which in a very readable manner introduces him to little known, but remarkable aspects of American life and law and which will make him ask the question whether in many of these matters English law does not allow too uncontrolled a discretion to the Executive.

F. A. Mann.

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Books for review should be sent to the care of the Publishers.

University of London Library.

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